LABOUR COURT

NOTIFICATION JUDGEMENT REASON DECIDE ; OVER STAY APPEAL OVER TIME

CHAIRPERSON LABOUR COURT PHOPI , SHERIF LABOUR COURT ,

PROCEDURE POLICY CCMA , LABOUR, APPEAL AFFIDAVIT

SANDF DEFENSIVE SELF DEFENSE COMMUNICATION , LABOUR RELATION

SKILL DEVELOPMENT SETA, CCMA TRAINING SAQA ,

DISMISSAL VS DISMISSAL AUTOMETICAL AWARD RULING RECORD TRANSCRIB CERTIFICATE , AGREE MENT COMMENCEMENT POST LEGISLATION

APPLICANT : TSHINGOMBE TSHITADI FISTON

RESPONDENT : NOGADA SECURITY

RESPONDENT : CCMA COMMISSIONER

NOTIFICATION REASON DECIDE APPEAL GROUND JUDGEMNT HEAD ARGUMENT APPLICANT POST APPEAL ,

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BE TAKE FOR FUTHER :

[1].

Provided by the Commission for Conciliation, Mediation and Arbitration (CCMA)

PREPARATORY STEPS FOR CCMA DISPUTE RESOLUTION PROCESSES CCMA Guidelines for Respondents

The following guidelines are made with a view towards assisting respondents to carry out preparations for conciliation, arbitration and associated processes.

The guidelines draw from and interpret the "Rules Regulating the Practice and Procedure for Resolving Disputes through Conciliation and at Arbitration Proceedings" - Regulation Gazette no. 6633, Government Notice R.245 of 31 March 2000 (commonly known as "the CCMA Rules").

The guidelines need to be read together with these Rules and the Labour Relations Act 66 of 1995 as amended ("the Act"). In terms of s115(6)(a) and (b) of the Act such rules have full legal force.

The guidelines are designed to facilitate the effective use of the CCMA. We hope this will make a significant contribution towards streamlining the dispute resolution process and avoiding unnecessary pitfalls in the application of the law.

1. CONCILIATION

The Act requires that all disputes falling within its jurisdiction must be conciliated. Conciliation is a relatively informal and flexible process in which an independent third party assists the parties in dispute to reach an agreement. It is a quick and inexpensive way of settling a dispute. It is also private and confidential, being conducted on a without prejudice basis. No party may refer to any statements made at conciliation proceedings during any subsequent proceedings, unless the parties have agreed to this in writing. S135(3) of the Act outlines the conciliation process, stipulating that:

The commissioner must determine a process to attempt to resolve the dispute, which may include-
(a) mediating the dispute;
(b) conducting a fact-finding exercise; and
(c) making a recommendation to the parties, which may be in the form of an advisory
arbitration award.

Conciliation proceedings in respect of more than one dispute involving the same parties may be consolidated. In terms of s135(3)(A) of the Act, where a commissioner has been appointed in respect of more than one dispute involving the same parties, the commissioner may deal with all the disputes in the same proceedings.

It is important to bear in mind that the sooner a dispute is addressed and settled the better it is for all parties involved. The dispute will not simply go away, and each time a respondent has to deal with a dispute it is a time-consuming and hence costly exercise. This means it is in the interests of a respondent to find a solution to the dispute at the pre-conciliation or conciliation stage.

1.1 Exhaust internal procedures and processes

The Act requires parties to exhaust internal procedures before a dispute is referred to the CCMA. Ensure that all internal procedures have been exhausted prior to a conciliation hearing being held, and that every effort

has been made to settle the dispute directly with the employee involved and his/her trade union representatives.

Workplace procedures
To facilitate internal problem solving and dispute resolution, ensure that suitable workplace procedures are in place. Effective and legitimate procedures limit disputes arising and facilitate their resolution at the workplace. Common workplace procedures include probation procedures, disciplinary procedures for misconduct, incapacity procedures for poor performance, incapacity procedures for ill health, and grievance procedures.

Organisational rights
In the case of organisational rights disputes, check that the provisions of S21(1), (2) and (3) of the Act have been complied with. Unless the provisions of S21 have been complied with a dispute referred is premature.

Mutual interest
Where a mutual interest issue is involved make every effort to ensure that the negotiation process is exhausted.

Unfair discrimination
In the case of an unfair discrimination dispute ensure that an attempt has been made to resolve the issue internally in compliance with S10(4)(b) of the Employment Equity Act 55 of 1998 (EEA).

Dismissals
In the case of dismissal disputes ensure that all the requirements of the Act have been followed. Depending on the nature of the dismissal, this includes S189 "dismissals based on operational requirements" and the associated code of good practice, or schedule 8 "code of good practice: dismissal". Also ensure the requirements of Chapter Five "termination of employment" of the Basic Conditions of Employment Act 75 of 1997 (BCEA) have been followed.

Settlement prior to conciliation
Forward written notice to the CCMA if it is agreed to withdraw the referral, or settlement with the applicant is reached prior to the conciliation hearing.

1.2 Consider all jurisdictional issues

On receipt of the referral for conciliation, check that the CCMA has jurisdiction for the dispute being referred. Examples of jurisdictional issues that commonly arise are:

· an internal dispute resolution procedure has not been exhausted;
· S21 of the Act has not been followed in the case of organisational rights disputes;
· S10 of the EEA has not been complied with in the case of unfair discrimination disputes;
· the dispute is covered by a bargaining council and not by the CCMA;
· the applicant is not an employee;
· a dismissal did not actually occur (in the case of a dismissal dispute);
· the dispute resolution process is covered by a collective agreement;
· the issue is covered by the Department of Labour (for example, disputes over entitlements to outstanding salary covered by the BCEA).

If there is a jurisdictional issue arising from a referral, forward written submissions to the CCMA and the applicant in advance of the conciliation hearing, following CCMA Rule 19.

Jurisdiction to conciliate
It is important to bear in mind CCMA Rule 6 - jurisdiction to conciliate:

6.1 The commissioner appointed to conciliate the dispute may only conciliate the dispute and thereafter issue a certificate in terms of S135(5) of the Act if the Commission has jurisdiction to conciliate.

6.2 If at any stage during the conciliation proceedings it becomes apparent that there is a jurisdictional issue which has not been determined, the commissioner must require the referring party to prove that the Commission has the necessary jurisdiction to resolve the dispute through conciliation.

Late referrals
S191(1) of the Act requires dismissal disputes to be referred within 30 days of the dismissal. Take note that the 30-day period is ordinary calendar days. Where a referral is late the applicant must apply for condonation following CCMA Rule 5.3:

If it is necessary to apply for condonation because the referral is being served out of time, the referring party/parties must at the time of the referral comply with the provisions of rule 19 and set out the grounds on which condonation is sought by attaching to the referral document details of the following:

(a) The degree of lateness;

(b) the reasons for the lateness;
(c) the referring party's prospects of succeeding with the referral and obtaining the relief sought against the other party; and
(d) the balance of convenience, including any prejudice to the other party.

Take note of CCMA Rule 5.4:

The Commission must refuse to accept a referral document until such time as Rule 5.1 to 5.3 have been complied with.

Carefully considering all jurisdictional issues prior to the hearing contributes towards the avoidance of unnecessary in limine hearings and the streamlining of the dispute resolution process. Bear in mind that any jurisdictional issue that may need to be addressed on the scheduled conciliation date will be determined through an in limine hearing. An limine hearing is separate to the conciliation process and representation must follow the provisions of S138(4) of the Act.

1.3 Check the CCMA referral form

Check that LRA Form 7.11 is completed accurately and correctly. Check that the dispute has been accurately categorised, the employer correctly cited, and that the form has been signed.

Where the form has not been correctly completed, forward written submissions to the CCMA and the applicant in advance of the conciliation hearing, following CCMA Rule 19. If it becomes apparent that a duplicate form has been referred, notify the CCMA and applicant accordingly.

Consider the provisions of S135(3)(A) of the Act regarding the consolidation of referrals when the same parties are involved.

1.4 Avoid postponements

Once notice of a conciliation hearing has been received, avoid requesting postponement. The CCMA Rules do not provide for postponement at conciliation, and generally an application for postponement will not be considered. If the parties require time to settle then the conciliation will be postponed to a fixed date for the filing of a settlement agreement. Whether or not filed, a certificate will be issued on the postponed date declaring the dispute resolved or unresolved.

1.5 Ensure appropriate representation

Ensure representation at the conciliation hearing follows the requirements of S135(4) of the Act:

In conciliation proceedings a party to the dispute may appear in person or be represented only by-

(a) a director or employee of that party; or
(b) any member, office bearer or official of that party's registered trade union
or
registered employers' organisation.

CCMA Rule 7.2 states that:

A conciliation hearing may only be attended by the parties to a dispute, their representatives referred to in S135(4) of the Act, and such other persons who, in the discretion of the Commission, are allowed to attend.

Only representatives referred to in S135(4) of the Act may attend the conciliation hearing and represent parties. In terms of Rule 7.2 the commissioner has discretion to allow other persons than the parties and their representatives to attend the hearing. This may be a party's legal representative, but s/he will not be entitled to speak on behalf of a party.

1.6 Attend the hearing
Make every effort to attend the conciliation hearing, and bear in mind section 1.4 above regarding postponements. 'No-shows' undermine the Act's objective of quick and fair dispute resolution, remove any chance of settlement, and are a significant drain on CCMA resources. Not participating generally prolongs the resolution of the dispute.

Bear in mind the provisions of CCMA Rule 7.7, including the following:

If a referring party fails to attend a conciliation hearing at the scheduled time, the referral will be regarded as having been abandoned by the referring party. If the referring party later decides to pursue the matter, the referring party will have to refer the dispute again under the same case number and if necessary, apply for condonation explaining ...

Determination of the nature of the dispute
In the eventuality of any disagreement regarding the nature of the dispute, the conciliating commissioner may decide upon the nature of the dispute. CCMA Rules 7.5 and 7.6 state that:

7.5 The parties may during the conciliation process agree on the nature of the dispute, whereupon the conciliating commissioners may attempt to resolve that dispute and, should this not be possible, may issue a certificate of non-resolution in respect of that dispute even though the

description of it may be different from the description of the dispute contained in the referral document.

7.6 In the event of disagreement regarding the nature of a dispute, the conciliating commissioner must issue a certificate of non-resolution in respect of the dispute as identified by the commissioner in the conciliation process.

1.7 Be prepared

Ensure representatives are well versed with the case, and have settlement proposals and a mandate. Endeavour to develop a creative mandate enabling a range of settlement options.

Schedule sufficient time to allow for the hearing to proceed over the allocated time frame, where necessary and possible. This could facilitate settlement.

Bring documentation that might assist in clarifying issues, including documentary evidence. However, leading evidence through witnesses is not carried out at conciliation.

1.8 Participate in telephonic conciliation

Depending on the nature and complexity of the dispute, the CCMA may decide to conduct a telephonic conciliation. A commissioner or case management officer would attempt to resolve the matter telephonically instead of scheduling and holding a hearing. Be open to seeking a settlement in this manner, as this will mean that the dispute could be settled immediately without the need for a hearing.

Should the dispute be settled through telephonic conciliation, an outcome certificate would be issued and a settlement agreement drafted for signing by both parties.

Where the dispute is unsettled and the CCMA is satisfied that a reasonable attempt has been made to conciliate the dispute, a certificate of outcome will be issued by a commissioner. Where the next step is the Labour Court, the applicant will be given the option of going through the conciliation process or being issued a certificate of non-resolution to proceed to the Labour Court.

Where the CCMA is not satisfied that a reasonable attempt has been made to conciliate the dispute, the matter will be scheduled for a conciliation hearing.

1.9 Aim to settle at conciliation

Where the internal dispute resolution processes have not settled the dispute, settlement at the conciliation stage should be seen as first prize in terms of the dispute resolution process provided by the Act. Conciliation provides for the quick and fair resolution of disputes. The decision-making regarding the outcome lies in the hands of the parties involved, and the conciliation process is uncomplicated. It is also inexpensive, and does not require legal representation.

Conciliation not only effectively resolve disputes, but is can also an important learning process which assists in the reduction of future disputes.

Engage with the process
Be prepared to participate in conciliation hearings with a view to engaging with the process and exploring all possible options for settlement. Avoid carrying over any personal tensions with the applicant/s that might have arisen during the internal process, and be prepared to concentrate on finding solutions to the dispute.

Conciliation agreement
Where an agreement is reached at the conciliation hearing, the commissioner will issue a certificate of outcome and a settlement agreement, stipulating the terms of the settlement. A conciliation settlement agreement is final and binding on both parties. If either party does not uphold the terms of the agreement, an application can be made to the Labour Court for the settlement agreement to be made an order of the court.

If settlement not possible
If the conciliation hearing does not result in a settlement being reached, an outcome certificate will be issued to this effect. The CCMA has 30 days from the date of receipt of the referral in which to bring conciliation to conclusion and issue an outcome certificate, unless the parties agree to extend the period.

The nature of the dispute, as stated on the outcome certificate, will determine whether the case may proceed to CCMA arbitration or to the Labour Court for adjudication.

2. ARBITRATION

In principle the preparatory steps for conciliation also apply to arbitration, including: correct completion of the referral form, appropriate representation, being suitably prepared, and dealing with jurisdictional issues. Unlike conciliation however, arbitration is a more formal process, and the arbitrator must make a determination of the outcome of the dispute in the form of an award. Whereas conciliation is a voluntary process where the parties agree the terms of the agreement, in an arbitration the arbitrator imposes an award on the parties after hearing the evidence.

S138 of the Act stipulates that-

(1) The commissioner may conduct the arbitration in a manner that the commissioner
considers appropriate in order to determine the dispute fairly and quickly, but must
deal with the substantial merits of the dispute with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.

2.1 Check the CCMA referral form and consider jurisdictional issues

On receipt of the referral form LRA 7.13, check that it has been correctly completed. Bear in mind that the CCMA can only arbitrate if a request for arbitration is filed and a certificate has been issued. The CCMA holds the view that S191(5) is subject to the provisions of S135(5)(a), which requires the conciliating commissioner to issue a certificate when (1) conciliation has failed or when (2) the 30 day period has expired from the date the CCMA received the conciliation referral. In terms of S136(1)(b) of the Act the arbitration must be referred to the CCMA within 90 days of the issuing of the certificate.

Consider all jurisdictional issues. Examples of disputes where the CCMA would not have jurisdiction to arbitrate (unless the parties agree) concern disputes about unfair discrimination and dismissals due to operational requirements (and see annexure 1). These disputes must be referred to the Labour Court.

Where the arbitration referral form has not been correctly completed or where there is a jurisdictional issue arising from a referral, forward written submissions to the CCMA and the applicant in advance of the arbitration hearing following CCMA Rule 19.

Bear in mind CCMA Rule 12, including 12.1:

The Commission may combine cases or join parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or fact.

2.2 Start preparations timeously

The CCMA will notify you of the date, time and venue of the arbitration hearing. In terms of Rule 20 the Commission must give the parties 15 day's notice of an arbitration hearing, unless otherwise agreed. It is advisable to immediately begin your preparations for the arbitration by

consulting with all relevant witnesses and obtaining all relevant documentary evidence.

2.3 Avoid postponements
Postponements of arbitration hearings are costly and undesirable. Postponements will only be granted where there is compliance with CCMA Rule 17. CCMA Rule 17.1 provides that:

Postponements will be granted without the need for the parties to appear if both of the following conditions are met:

(a) All the parties to the dispute agree in writing to the postponement; and
(b) the request for the postponement is received by the Commission more than 10 days prior to the scheduled date of the arbitration.

In all other cases a formal application in writing for postponement must be made and served before the scheduled date for the arbitration.

2.4 Be open to settlement through conciliation
S138(3) of the Act provides for conciliation during the arbitration process. Settlement through conciliation is still the desirable option as the parties retain the right to settle on their own terms. Be prepared for possible settlement before or during the arbitration process.

2.5 Prepare submissions and evidence for the arbitration
Prepare the evidence you will lead at the arbitration. Determine which issues are in dispute and which issues are not. Ensure the submissions you intend to make are clear and concise. Compile all relevant documents and make copies for the arbitrator and the applicant. These copies should be collated into a bundle with each copy given a page number. Prepare an index for the bundle. Correspond with the other party and attempt to secure agreement over the issues covered in Rule 10. Prepare which witnesses you will call to support your case.

2.6 Hold a pre-arbitration conference
CCMA Rule 10.1 provides that:
By agreement between the parties or when so directed by the director or a senior commissioner the parties to the proceedings must hold a pre-arbitration conference dealing with the matters referred to in rule 10.2.

It is preferable for a pre-arbitration conference to be held attended by all parties to the dispute, particularly where the dispute is complex, following the provisions of CCMA Rule 10.2. The purpose of a pre-arbitration conference is to streamline the arbitration hearing. It also assists parties to ensure that they are properly prepared for the arbitration. At a pre-arbitration conference the following issues are discussed: facts in dispute, common cause facts, issue/s to be decided, relief claimed and the exchange of documents that will be used in the arbitration. At the

conclusion of the pre-arbitration conference draw up and sign a minute and submit the minute to the appointed commissioner at least seven days prior to the arbitration hearing.

2.7 Bring appropriate witnesses
Ensure that the appropriate witnesses are available for the hearing, but avoid bringing unnecessary witnesses. Do not request the CCMA to subpoena witnesses unless absolutely necessary. Follow CCMA Rule 18 when requesting a subpoena.

2.8 Ensure appropriate representation
Ensure representation follows the requirements of S138(4) of the Act:

In arbitration proceedings a party to the dispute may appear in person or be represented only by-
(a) a legal practitioner;
(b) a director or employee of the party; or
(c) any member, office-bearer or official of that party's registered trade union or registered employers' organisation.
In the case of dismissals for reasons related to conduct or capacity, bear in mind S140 of the Act:

(1) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite S138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings unless-

(a) the commissioner and all other parties consent; or
(b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-

(i) the nature of the questions of law raised by the dispute;
(ii) the complexity of the dispute;
(iii) the public interest; and
(iv) the comparative ability of the opposing parties or representatives to deal with the arbitration of the dispute.

Ensure that representatives have a direct knowledge of the case.

Bear in mind CCMA Rule 21.1:

S138(4) read with S140 of the Act explicitly states who may appear or be represented in arbitration proceedings. A commissioner has no discretion to permit any person other than those listed in that section to appear or act as a representative even if the other parties have no objection.

Where an advocate appears in that capacity (as an advocate) at a CCMA hearing sh/e only has right of appearance if briefed by a firm of attorneys. Advocates are required by the commissioner to place the name of the briefing firm of attorneys on record. An advocate may either be briefed with a brief or verbally.

2.9 Failure to attend can mean the hearing will proceed
S138(5)(b) of the Act allows the commissioner to proceed with the arbitration hearing in the case where the respondent does not appear.

CCMA Rule 23 stipulates the following:

23.1 If a party fails to appear in person or to be properly represented at a scheduled arbitration hearing, the commissioner may act in terms of S 138(5) of the Act.

23.2 The commissioner must be satisfied that the parties have been properly notified of the date, time and venue of the arbitration proceedings, before making any decision in terms of S138(5).

23.3 The Commission must notify the parties if a matter is dismissed.

If the arbitrator proceeds, with or without the respondent, the respondent will still be bound by the arbitration award.

2.10 The respondent bears the onus to establish fairness in dismissals
S192 of the Act states that:

(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.

2.11 The arbitration award must be issued within fourteen days

An arbitration award must be issued within fourteen days of the conclusion of the arbitration proceedings and served on both parties. On good cause shown by the arbitrating commissioner, the CCMA Director may extend this period. The arbitration award usually covers the following areas: details of hearing and representation, issues to be decided, background to the issue, survey of evidence and arguments, analysis of evidence and arguments, and the award.

An arbitration award is final and binding. Should the respondent fail to follow the award, the applicant can refer the matter to the Labour Court for the award to be made an order of the court.

2.12 Avoid procedural unfairness and acting in a frivolous or vexatious manner - costs may be ordered

Arbitration fee
In cases of dismissal relating to conduct or capacity where a commissioner finds that a dismissal is procedurally unfair, in terms of S140(2) of the Act the commissioner may charge an employer an arbitration fee.

Cost order for vexatious or frivolous behaviour
In terms of S138(10) of the Act a commissioner may include an order for costs in the arbitration award if a party or person who represented the party in the proceedings acted in a vexatious or frivolous manner:

(a) by proceeding with or defending the dispute in the arbitration proceedings; or

(b) in its conduct during the arbitration proceedings.

Meaning of 'costs'
The term 'costs' refers to an order by a CCMA commissioner for parties to pay the other party or parties for certain expenses incurred in having a dispute resolved through arbitration. Cost orders only allow certain expenses incurred in the arbitration to be recovered, such as legal costs incurred and certain disbursements incurred, such as subsistence and travelling costs of witnesses.nt of the amount allowed for costs claimed and is carried out by a CCMA taxing officer following CCMA Rules 14 and 15. Once the bill of costs has been taxed the amount of money allowed by the taxing officer can be claimed from the other party.

3. OTHER IMPORTANT PROVISIONS OF THE CCMA RULES AND THE ACT

The CCMA Rules include a number of other provisions which, read with the Act, need to be taken into careful consideration when making use of the CCMA.

3.1 Applications / motion proceedings in respect of preliminary matters

CCMA Rule 19 stipulates the required processes for applications for condonation, jurisdictional disputes, variation and rescission applications, and other interlocutory applications (for example, change of citation and joinder of parties). Compliance with CCMA Rule 19 is extremely important to ensure effective and smooth functioning of CCMA processes.

Rule 19 provides that any application must be in writing and served on all parties to the dispute and the CCMA. In terms of Rule 19.2 the application must state:

(a) The title of the matter;
(b) the case number assigned to the matter by the Commission;
(c) the relief sought;
(d) an address of the party delivering the document at which the party will accept notices and service of all documents and proceedings;
(e) a notice advising the other party that if intends opposing the matter, the party must deliver an answering affidavit within five days after the application has been served, failing which the matter may be heard in the party's absence, and
(f) a schedule listing the documents that are material and relevant to the application.

An affidavit must be attached to the application in terms of Rule 19.3 setting out:

(a) the names, description and addresses of the parties;
(b) a statement of the material facts, in chronological order, on which the application is based, which statement must be in sufficient detail to enable any person opposing the application to reply to the document;
(c) a statement of the legal issues that arise from the material facts, which statement must be sufficient in detail to enable any party to reply to the document; and
(d) the relief sought.

CCMA Rule 19.9 stipulates that:
Any ruling made by a commissioner in terms of these Rules which has the effect of a final order will be regarded as an arbitration award.

3.2 Review, variation and rescission of arbitration awards or rulings

Review: S145
Where a party alleges a defect with a commissioner's ruling or award, the party's remedy is to review the decision in the Labour Court in terms of S145 of the Act. In terms of S145 of the Act any party who alleges a defect in the arbitration proceedings may apply to the Labour Court to set aside the award within six weeks of the award being served.

In terms of S145(2), a defect means -

(a) that the commissioner -

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.

It is important to note that the review is not an appeal, is not on merit and is only related to the commissioner's conduct.

Variation or rescission: S144
A party may apply for variation or rescission of a ruling or an arbitration award in terms of S144 of the Act. In terms of S144, a commissioner acting on their own accord or on application from any affected party, may vary or rescind an arbitration award -

(a) erroneously sought or erroneously made in the absence of any party affected by that award;

(b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or

(c) granted as a result of a mistake common to the parties to the proceedings.

The application must comply with the provisions of the CCMA Rule 19: it must include a notice of motion supported by affidavit and be served on the applicant. The application must be brought within 10 days of the date on which the applicant became aware of-
(a) the arbitration award or ruling; or
(b) a mistake common to the parties to the proceedings.
(see Rule 24)

Limited application of S144
There are a limited range of circumstances where S144 can be applied. If a ruling or award was made, for example, arising out of a process where both parties were present, it is unlikely that a rescission can be considered. Recourse in this circumstance would be by application of S145 of the Act: a review of the award or ruling to the Labour court.

The same commissioner must hear the application
The commissioner who issued the arbitration award or ruling must hear the application for variation / rescission. CCMA Rule 24.3 does provide that "the commission may, on good cause shown, appoint any commissioner to hear the application".

Good cause in this case means if the commissioner who made the award is unavailable through illness, death, or has resigned, or has been transferred or is doing duty elsewhere.

All decisions constitute a ruling
All decisions made by a commissioner during a process constitute a ruling.

3.3 Definition of 'day'

In terms of the definition of 'day' in the CCMA Rules a 'day' is calculated as a working day and is defined as:

"any day excluding Saturday, Sunday, public holiday and the days in the period from 16 December to 7 January, both days inclusive; when any particular number of days is prescribed for the doing of any act, the number of days must be calculated by excluding the first day and including the last day, unless the last day falls on a Saturday, Sunday, public holiday or on a day during the period 16 December to 7 January, in which event the number of days must be calculated to exclude the first day and also such last day".

The definition of 'day' in the Act is different to that in the CCMA Rules. A 'day' in the Act means a calendar day, as opposed to a working day. It is important to bear this in mind when calculating the 30-day referral period for conciliation and the 90-day referral period for arbitration.

The Act does not define 'day' which means that one has to refer to S4 of the Interpretation Act of 1957. In terms of S4 of this Act all days including weekends and public holidays are counted, and days are counted by excluding the first day and including the last day.

ANNEXURE 1

The following is a complete list of possible processes that disputes would follow where conciliation has failed:

CCMA arbitration	
Collective agreements:	
Interpretation or application of collective agreement	24(5)
Interpretation or application of lapsed collective agreement	61(13)
Disclosure of information	16(9)
Disputes in essential services	74(4)
Interpretation or application of ministerial determination	45(4)
Organisational rights:	
Collective agreement on organisational rights	21(7)
Withdrawal of organisational rights	21(11)
Interpretation or application of organisational rights	2(4)
Severance pay	147 [BCEA]
Dismissals:	
Misconduct, capacity, performance, unknown reasons,	191(5)(a)

constructive dismissal	
Unfair labour practices	Sch 7, 3(4)(b)
Workplace forums:	
Joint decision-making	86(7)
Disclosure of information	89(6)
Interpretation or application of workplace forum provisions	94(4)
Labour Court adjudication	
Admission of parties to a Bargaining Council	56
Admission of union to a closed shop agreement	26
Breaches of picketing provisions or picketing agreements	69
Dismissals:	
Automatically unfair dismissals	191(5)(b)(i)
Dismissals based on operational requirements	191(5)(b)(ii)
Dismissals for participating in an unprotected strike	191(5)(b)(iii)
Dismissals connected with closed shops	191(5)(b)(iv)
Freedom of association	9
Unfair discrimination	10, Ch 11 [EEA]
Disputes that cannot be arbitrated or adjudicated	
Mutual interest	64(1), 134
Unilateral change to terms and conditions	64(4)

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- 24 Hour Notices
- Absenteeism
- Afrikaanse Artikels
- Alcoholism in the workplace
- Bargaining councils
- Bonuses
- Condonation
- Constructive Dismissal
- Consumer Protection Act
- Contracts of Employment
- Deductions for damage or loss
- Derivative Misconduct
- Desertion
- Dismissals
- Employer Organisations
- Employment Equity
- Equal Pay for Work of Equal Value
- Hours of Work and Overtime

- Inconsistency relating to the disciplinary sanctions
- Insubordination
- Labour Centers
- Labour Court Judgements
- Leave Guide
- Medical certificates
- Negligence
- Overtime in practice
- Polygraphs
- Poor Performance
- Pregnancy and the employer
- Probation
- Procedural Fairness
- Public Holidays
- Resignations
- Setas
- Skills development
- Substantive Fairness
- Trade Unions Federations
- Trade Unions in South Africa
- Transportation of night workers
- Unilateral Changes
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Warnings

André Claassen

Because of the progressively corrective nature of disciplinary action, the sanction applied should also be progressive in nature. Depending on the severity of the offense and the circumstances under which it as committed, the sanction can range from a verbal warning through to a written warning, a final written warning and dismissal. Warnings do not necessarily have to follow the order of verbal – written – final written – dismissal, unless the employer has made provision for this procedure in his Disciplinary Code

Thus, if the employer's Code states that for a first offense of misconduct a verbal warning must be given and for the second offense of a similar nature a written warning must be given, then for the third offense a final written warning then on the fourth offense dismissal, then the employer is generally bound to follow his own procedure. It is therefore possible to dismiss even on a first offense and without any prior warnings having been issued, but that will depend on the severity of the offense, the circumstances under which it was committed, and the provisions of the employer's Disciplinary Code.

There are certain elements that must be contained in a warning. The purpose of the warning is to try and correct a situation, if necessary by progressively more severe sanction each time the offense is repeated, or if there are repeated offenses of misconduct.

A warning must contain

- the identity of both parties
- the nature of, date of and time of the offense
- the terms of the warning and validity period
- clear statement of what action is required of the guilty party to rectify the situation
- clear statement of the consequences of the guilty party's failure to take heed of the requirements of the warning or of repeated offenses (of similar or other misconduct)

Verbal Warnings

A verbal warning is usually applied for a very minor offense, where the matter is resolved at shop floor level. Where a verbal warning is warranted, it is seldom necessary to embark on formal disciplinary procedures, and an informal procedure culminating in a verbal warning will generally achieve the desired result. As in every case, prior to issuing the warning, the manager concerned must follow a fair procedure and allow the employee the opportunity to put his side of the case.

The verbal warning is then issued, in the presence of a witness or shop steward, and the manager issuing the warning must ensure that the employee understand why the warning has been issued and what action is required of the employee to rectify the situation, and – very importantly – the employee must understand what the consequences will be should he/she fail to take heed of the warning. A verbal warning, say for swearing at a colleague, would be something like this"

"Godfrey Smith, as you know Jeffrey Dlamini reported to me that you swore at him at tea time today in the canteen**.** (both parties are identified, the nature of the offense is stated and the date, time and place of the offense is stated.) I have heard your side of the story

and I have heard Jeffrey's evidence. I am satisfied that you swore at Jeffrey and you have admitted this and apologized. I am giving you now a verbal warning in the presence of the shop steward Alfred Molefe that swearing at your colleagues for any reason is unacceptable and will not be tolerated. You are warned against using foul or abusive language against any person at this company. (this tells the guilty party what he must do to rectify the situation.)

This warning is valid for 3 months, this tell the guilty party how long he has got to rectify the matter) and should you fail to take heed of this warning then stricter disciplinary action will be taken against you. (this tells him what will happen if he does not rectify the matter) Do you understand what I have just explained and do you understand what will happen if you fail to take heed of this warning?" (this makes certain that there is no misunderstanding on the part of the guilty party about what is required.)

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It is not recommended that details of a verbal warning be placed on the employee's personal file. This is a minor matter and is handled at shop floor level. The employee's personal record will become involved only when and if formal proceedings are invoked. Should there be no recurrence of a similar nature within the validity period of the verbal warning, then the notes made by the manager in his diary may be deleted.

Written warning

A written warning is resorted to when

- a verbal warning has failed to produce the desired result, therefore necessitating stricter action,
- or if the offense for which a verbal warning was issued has been repeated
- or if there have been repeated offenses of other misconduct,
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It is emphasized that a written warning should only be issued after having followed a fair procedure, whereby the accused has been afforded the opportunity to present his case in answer to the charges against him. A written warning must contain all the elements previously mentioned, and would generally be along the following lines:

Example of written warning:

To " Mr Naughty employee"

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You refused, failed or neglected to carry out this instruction with the result that the battery of the truck was stolen during the night because you left the truck parked in the yard , incurring the company in expenses of R800-00 for a new battery. (the employee has been identified and the date, time , place and nature of the offense clearly stated)

You were found guilty as charged by the Chairperson of the Disciplinary Hearing, and you must clearly understand that insubordination – including a failure, refusal or neglect to carry out a reasonable and lawful instruction is regarded as a serious offense and will not be tolerated. (the employee is told that this is considered to be a serious matter.) You are hereby warned that should you commit a similar offense or should you commit any further act of misconduct during the validity period of this warning, further and more stringent disciplinary action will be invoked, which may include your dismissal.

You are required to refrain from committing any acts of misconduct during the course of your employment with this company. This warning is valid for a period of 6 months from date hereof. (the employee has been told that the offense is serious, that he must not commit acts of misconduct, that he must not commit a repeat offense, and that the warning is valid for 6 months. He has also been warned of what consequences may result should he fail to heed the requirements of this warning, namely that he could be dismissed)

(The employee has also been told what action is required of him to rectify the situation.)

Yours Faithfully,

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Very Annoyed Boss.

I know and understand the contents of this warning. I have received a copy of this warning.

Employee signature _____ Date : _____

Witness Signature : _____

The employee signs this to state that he understands the contents of the warning and that he has received a copy. He is not signing to say that he agrees with it – only that he understands it and has received a copy. Should the employee refuse to sign, then hand him a copy in the presence of the witness, and the witness will certify on the file copy of the warning that a copy was handed to the employee.

Final written warning

A final written warning is taking the disciplinary process a step further, and is in fact a sort of "last resort" The perception is simply "if this does not work, then out he goes." If any previous written warning (remember there need not necessarily have been any previous written warnings – this final written warning can be issued even for a first offense if the seriousness of the offense calls for such strict and serious action) has failed to achieve the desired result, then the final written warning is issued.

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In addition, you were found guilty of a charge of insubordination on 31st March 2010, and for which a written warning was issued and which is still valid. Clearly, you have either refused, failed or neglected to heed the contents and requirements of that written warning. Management is no longer prepared to tolerate your repeated acts of misconduct. This warning is valid for a period of 12 months, and you should take note that should you fail to take heed of the requirements of this final written warning, then further disciplinary action will follow and should you be found guilty, your dismissal will result.

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It should be noted that sectoral determinations in terms of the Basic Conditions of Employment Act applies in the industry it has been promulgated for. The determinations do not apply to workers who are covered by another sectoral determination, or a bargaining council agreement, entered into in that specific sector.

The Basic Conditions of Employment Act applies in respect of any other matter not covered by the sectoral determination. This does not preclude employers from negotiating with recognised unions on employment matters not regulated by sectoral determinations or applicable bargaining council agreements.

The CCMA Forms, sectoral determinations, policies and certain guidelines are available on the CCMA at www.ccma.org.za or www.labour.gov.za

Please note that this is not the Commission for Conciliation, Mediation and Arbitration (CCMA), you may find the CCMA on www.ccma.org.za. The South African Labour Guide is a private company and has no association with the Commission for Conciliation, Mediation and Arbitration (CCMA).

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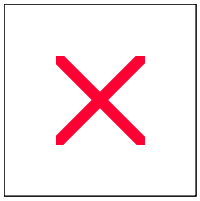
Breaking News



Delivered	Citation	Court
2018 04 26	**Prins v Schoonies Trust (C 999-14)**	CT

Information and downloads provided by The Department of Trade and Industry and the B-BBEE Commission

More Companies Are Fronting their Workers

B-BBEE Commission Initiates Investigations into Possible Fronting Practices and Non-Compliance with B-BBEE act

B-BBEE Amended Codes of Good Practice

The Minister of Trade and Industry Dr Rob Davies (MP) hereby:

- Published a Notice of Clarification for the Amended B-BBEE Codes of Good Practice, **Gazette Number 38764**
- Published schedule of the Amended Codes of Good Practice, **Gazette number 38765**
- Published Phase 2 of the Amended Codes of Good Practice, **Gazette number 38766**

B-BBEE Act

- **Broad-Based Black Economic Empowerment Amendment Act, 2013** (Act No. 53 of 2003) [PDF]
- **B-BBEE Act** 2003-2004 [PDF]

B-BBEE Forms

- Compliance Report by Sphere of Government, Organ of State and Public Entities
- Compliance Report by company listed on Johannesburg Stock Exchange (JSE)
- Compliance Report by Sectoral Education and Training Authorities (SETAs)
- Notice of Non-Compliance

- Notice for Rejection of Report
- Notice of Compliance
- Restricted / Confidential Information
- Complaint Form
- Request for Additional Information
- Demand for Corrected Information
- Notice to Investigate
- Notice of Non-Investigation of Complaint
- Notice of Referral to Alternative Dispute Resolution (ARD)
- Notice of Referral of Complaint
- Application to Exceed Qualification Criteria
- Certificate of Approval
- Submission of Deviation or Exemption Report
- Application for Deviation / Exemption
- Major B-BBEE Transaction
- Registration Certificate
- Commissioning of Summons
- Notice of Extension of Time for Further Investigation

Broad-Based Black Economic Empowerment Codes of Good Practice

- **Broad-Based Black Economic Empowerment (B-BBEE) Codes of Good Practice**
- **Phase 2 B-BBEE Codes of Good Practice Gazette No.38766, 6 May 2015**
- **Revised notice of Clarification on application of the B-BBEE Codes of Good Practice**

- **Revised formulas for code Series 200 and 300, fifth criterion for empowering supplier**

Sector Codes Gazetted under Section 9 (1)

Sector Code	Effective Date	Abstract of the Code	Download
Amended Agri-BEE Sector Code	08 December 2017	The Sector code aims to support the acceleration of land reform in South Africa by setting a target for equity and land ownership. Landowners are incentivised with bonus points for transferring to black people in excess of the 30% land reform target.	**Government Gazette No. 41306**
Amended Financial Sector Code	01 December 2017	A key, unique feature of the Financial Sector Code is the introduction of an extra element, bringing the elements to eight in total and not seven as in the Generic Codes. The extra element, known as Access to Financial Services, aims to facilitate access to finance for black people and black-owned enterprises.	**Government Gazette No. 41287**
Amended ICT Sector Code	07 November 2016	The ICT sector has set a black ownership target of 30% to be achieved by entities in the sector. The main feature of the charter is a set target of 5% Net Profit After Tax to be spend on enterprise development initiatives that are aimed at growing and developing black owned ICT enterprises.	**Government Gazette 40407** **Clarification Statement**
Amended Property Sector	09 June 2017	The Sector Code is an industry-agreed empowerment initiative in the Forest Sector and seeks to deal with transformation challenges in Forest Sub-Sectors of commercial primary growth, fibre production, contracting, saw milling, pole and charcoal. The Forest Sector Code gives bonus points as an incentive for enterprises to achieve the requisite 30% BEE ownership. It further seeks to encourage and support entities to undertake BEE-compliant procurement and job creation initiatives in the sector	**Government Gazette 40910**
Chartered	10 May	The Chartered Accountancy Profession aims to	Repealed

Accountancy Sector Code	2011	increase the number of black people, particularly black women entering the profession, to reflect the country's demographic population. Black Chartered Accountants have been identified as possessing critical skills that are in short supply and yet in great demand in South Africa. The Sector aims to achieve 32,5% black ownership target by 2016	effective 17 February 2016
Integrated Transport	21 August 2009	The Minister of Trade and Industry, Dr Rob Davies (MP) announced the gazetting of the Integrated Transport Sector Codes, in terms of the B-BBEE Act. The Integrated Transport Sector Codes comprise eight (8) sub-sectors, which seek to boost one of South Africa's largest infrastructure and Gross Domestic Product contributors. In alignment with government's national transport action plan, the Codes aim to fast-track the implementation of efficient transportation, freight and logistics sectors within the economy.	**Government Gazette 32511**
Amended Forestry Sector Code	21 April 2017	One of the main highlights is the achievement of a 35% black-ownership target, within a period of five (5) years, as prescribed by the Bus Commuter Service Sub-Sector Code. Unlike other Sector Codes gazetted earlier this year, the Integrated Transport Sector Codes will be continuously reviewed, at five (5) year intervals, from the date of publication thereof The Sector Code is an industry-agreed empowerment initiative in the Forest Sector and seeks to deal with transformation challenges in Forest Sub-Sectors of commercial primary growth, fibre production, contracting, saw milling, pole and charcoal.The Forest Sector Code gives bonus points as an incentive for enterprises to achieve the requisite 30% BEE ownership. It further seeks to encourage and support entities to undertake BEE-compliant procurement and job creation initiatives in the sector.	**Government Gazette 40803**

Amended Construction Sector Code	01 December 2017	It presents the industry with the ideal opportunity for the advancement of transformation and BEE in the procurement of construction programmes and services. The Code also seeks to regulate a target of 30% black ownership in the industry over the next 10 years	**Government Gazette 41287**
Amended Tourism Sector Code	20 November 2015	The highlight of the Tourism Sector Code is that it has a reduced threshold of R5 million, as compared to a threshold of R10 million, set out in the Generic Codes. This decrease seeks to ensure that a significant number of enterprises doing business in the tourism industry are not excluded from compliance with the Sector Code.	**Government Gazette 39430**
Amended MAC Sector Code	01 April 2016	Black Ownership target of 45% (30% is reserved for black women ownership) which should be achieved as of 31 March 2018. The 45% black ownership target is higher than the 25% target of the Generic Code. The 45% ownership was negotiated and agreed for by sector stakeholders and it will contribute towards increasing the number of black people that manage, own and control enterprises in the MAC sector. The increase of the absorption points to 10 under the Skills Development Element which is higher than the five in the Generic Codes. Entities in the sector will be rewarded more for training and for providing employment opportunities for young black graduates. This was done to increase a pool of human resources in the sector especially amongst young black people and also contribute towards addressing unemployment in the country.	

Title

UIF Downloads

UIF Adoption Benefits

Worker's Guide to UIF

Employer's Guide to UIF

UIF Registration

UIF Unemployment Benefits

UIF Illness Benefits

UIF Maternity Benefits

UIF Dependant’s Benefits

UIF Contributions

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UIF Contributions

COID Downloads

Compensation Fund: Good news in the pipeline at Fund

Compensation Fund to introduce electronic submission of claims

Compensation Fund embarks on national road shows to advance the benefits of decentralisation

Travelling to and from work - covered by workmen’s compensation or not?

Guide in Respect of Claims

Guidelines for Claims

COID and Employer Registration

Claiming Procedure for Injuries on Duty

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Employers can drown in their redundancy pools

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Retrenchments and transfer of businesses

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Employment Equity Act

Employment Equity Act – Amendments May 2006.

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Employment Equity : Part 2

Code of Good Practice on the Integration of Employment Equity into Human: Part 5

Code of Good Practice on the Integration of Employment Equity into Human: Part 8

Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices : Part 7

Code of Good Practice on the Integration of Employment Equity into Human

Click here to download the new code of conduct on Employment Equity

Bosses must act as EEA reports deadline looms

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Update: Occupational Health and Safety Act and Regulations (85/1993)

Excavation collapse results in death of employee inline of duty

Compensation Fund (CF) tells Portfolio Committee of progress on its Action Plan

Grayston Bridge inquiry to resume in September

Update: Occupational Health and Safety Act: Regulations: Inclusion of noise monitoring by means of personal dosimetry in Regulation 7 of the Noise Induced Hearing Loss Regulations

Update: Occupational Health and Safety Act and Regulations (85/1993)

COID Update, Increase in Monthly Pensions 2017, Increase of Maximum Amount of Earnings 2017, Schedule 4 (2017)

Health and Safety: Guidelines to the Construction Regulations, 2014

Dr Adams found guilty of defrauding Department of Labour's Compensation Fund

Proposed Driven Machinery Regulations

Incorporation of the Code of Practice for Zip Line (Occupational Health and Safety Act; Act 85 of 1993)

Health and Safety Reminder (R.641 of 2015)

Health and Safety Update (R.94 of 2017)

Department of Labour on the verge of canvassing public comment on OHS Bill

Two trapped in Sandton construction wreckage

Department of Labour to publish draft major hazard installation regulations next January

Department of Labour takes services to the people

Notice of Direction: Section 27(2) of the Occupational Health and Safety Act, read with Regulation 3(4)(a) of the General Safety Regulations

Correction Notice: Incorporation of Safety Lift, Escalator and Passenger Conveyor Regulations, 2010

OHS non-compliance in public health sector of major concern to labour

department
Labour puts spotlight on public health care facilities
Presiding Officer in the M1/Grayston Drive Pedestrian and cyclist structural bridge collapse Inquiry postpones proceedings till next year
Form-Scaff expert witness rejects bias jibe in the Department of Labour inquiry
Murray & Roberts' third expert witness, tells M1/Grayston Drive inquiry he would have redesigned drawings
Department of Labour-appointed M1/Grayston Inquiry to further interrogate Murray & Roberts witness
Wind gust and other factors caused grayston bridge collapse - witness tells department inquiry
Grayston drive pedestrian and cyclist structural bridge collapse inquiry to resume
Tongaat Mall Collapse Inquiry - Report to be handed to the NPA
Employers should have zero injuries target - Minister
Department of Labour-appointed Grayston Drive Pedestrian and cyclist structural bridge collapse Inquiry postpones sitting for lack of information
Occupational Health and Safety Act and Regulations (85/1993) : Update
No link between Lily mine collapse and suicide - Employer
Inquiry starts into collapsed bridge on Grayston Drive
Grayston Bridge: bolts missing before collapse
NUM statement on the release of the 2015 mine health and safety statistics
Mine deaths skyrocket at Impala Platinum's Mine in Rustenburg
Sailors injured after explosion on ship
Department of Labour hosts 5th Annual Explosives workshop to empower safety managers
Managing office temperature

Department of Labour puts danger posed by Hazardous Biological Agents (HBA) on the spotlight

Department of Labour to set up Section 32 Inquiry to comb for further evidence into Grayston Drive pedestrian and cyclist structural bridge collapse

Preliminary report on M1 Grayston Bridge

Department of Labour hosts 5th Annual Explosives Manager Safety workshop to discuss OHS in explosives environments

Mining health, safety committee urged to 'spend the money'

Two dead in Grayston bridge collapse

Compensation Fund (CF) to assess its core business

COID Notice to claim unpaid merit rebates for qualifying employers

Three children hurt in school scaffolding collapse

SANAS accreditation as a requirement for approval as an Approved Inspection Authority to perform inspection services

Worcester stadium collapses, 20 people injured

The Department of Labour host workshop to launch the Driven Machinery Regulations

Deaf school was warned of imminent fire

How labour department put lives at risk

Update: Occupational Health and Safety Act and Regulations (85/1993)

Court orders labour dept to disclose accident reports

Update: Occupational Health and Safety Act

KZN workers in brush with death as trench collapses

Mpumalanga govt employee hurt in ceiling collapse

Department of Labour Implores the Construction Industry into Partnership to Reverse the Escalating Loss of Life

Department of Labour hosts Construction Sector Seminar ahead of implementation of new Construction Regulations 2014

Two construction workers injured in Sandton City ceiling collapse

Department of Labour gears for Construction Sector Seminar ahead of implementation of new Construction Regulations 2014

Temporary closure of Soshanguve Labour Centre

Labour DG appeals to Parliament for more inspectors

6 construction workers killed by lightning

Fire forces evacuation of BMW Century City

Mall contractor Jay Singh admitted at inquiry that there were more drawings used in the project

Engineer never said anything was wrong

8 men injured in Randburg wall collapse

Thongathi (Tongaat) Mall Structural Collapse Commission of Inquiry gears for week-long session

Stellenbosch fire damage in millions

Trauma counselling for Maties staff

Miners 'not too scared' during dramatic rescue

Kusasalethu safety concerns – NUM

All the trapped mine workers have been brought to the surface – Harmony Gold

LIVE: 330 of almost 500 trapped mineworkers rescued

Halting mine operations - The need for health and safety instructions by the mine inspectorate to be procedurally compliant

Frequently Asked Questions

I have resigned and have 25 days leave due to me. Can I take this leave during

my notice period ? I have told my employer I want to take my leave in my period of notice but he refuses.

Section 20 (5) (b) of the BCEA states clearly that "the employer may not require or permit an employee to take annual leave during any period of notice of termination of employment."

This means that, in terms of the act, an employee is prohibited from taking leave during his period of notice on resignation, and the employer is prohibited from forcing the employee to take leave during any period of notice.

We have an employee who has given us four weeks notice, but the employment contract states one calendar month - what can we do ?

The conditions of the employment contract are lawful, provided that the period of notice applies to the employer - namely that if the employee should be retrenched or dismissed with notice, then the employer is obliged to also give the employee one calendar months notice. If the condition applies to both parties, then the employer can force the employee to comply with the condition. Should the employee refuse and simply walked out, the only thing the employer can do is sue the employee for damages in terms of breach of contract.

We have a clause in our contract stating that employees who earn over the threshold amount as determined by the Minister, are exempted from the provisions relating to maternity leave. The clause states further that the company will stipulate what period of maternity leave they are prepared to allow. Is this legal?

This is not correct. Section 25, which sets out the provisions for maternity leave, he is not stipulated as an exclusion in the Ministerial determination. All employees, irrespective of earnings, are entitled to 4 months unpaid maternity leave in terms of the BCEA. There is no legal obligation on any employer to pay the employee a salary or portion of salary during a period of maternity leave, but the employer is legally obliged to allow the employee the full period of four months as a minimum.

We have an employee who has exhausted all their sick leave for this three-year cycle, as well as the annual leave for the current cycle. The employee now needs to go into hospital for an operation and will be off work for six weeks. Are we obliged to pay him ?

Unfortunately, if all sick leave has been exhausted as well as all available annual leave in the current cycles, and the employee requires further sick leave, there is no legal obligation on the employer to pay the employee and the additional requirement may be treated as unpaid leave.

We have a clause in our employment contract stating that if an employee is off sick on a Friday or a Monday, or on the Friday and a Monday, or if he is off sick the day before the day after a public holiday, he must produce a sick note, otherwise be time-off will be treated as unpaid leave. Is this condition legal?

Unfortunately, it is not a lawful condition. The BCEA states clearly in the section 23 that if an employee has been absent from work for more than two consecutive days (which means three days or more) then he is obliged to produce a medical certificate. A Friday is 1 day only, and a Monday is 1 day only, and the same applies to the day before and the day after a public holiday - those days each constitute only 1 day, and therefore no medical certificate is required. However, if the employee is absent on more than two **occasions** - even if the occasion is 1 day only - during the same eight-week period, then on the third occasion of absence during that eight-week period the employer is entitled to insist on a sick note, and if it is not produced, the employer is not obliged to pay the employee for the time-off.

We have an employee who has resigned and walked out on 24 hours notice. He has already been paid his salary, but he is owed 15 days leave. Can we withhold his leave pay in lieu of notice?

Unfortunately you are not permitted to do that. Section 40 of the BCEA makes it clear what payments must be made to an employee upon termination of employment, and this includes outstanding leave pay. The only way this can be overcome is if it is inserted into the employment contract as a condition of employment that should the employee contravene the provisions regarding the period of notice required, then the employer would be entitled to withhold salary or leave pay in lieu of notice. However, you would not be entitled to now rush out and amend all your existing employment contracts. If you wish to do that, it can only be done by consultation with your existing employees.

We have an employee who has been with us for 12 months. We sent him on a training course when he joined us, which cost us R8000. He has now resigned - can we make him pay us back for the cost of the training course?

If no (preferably written) agreement was entered into before the employee embarked on the training, to the effect that he would be liable to repay you for the cost of the training should he leave your employment, then there is nothing you can do.

You can't force such a condition on him now because it is after the fact. The conditions attached to the training should have been made clear to the employee in an agreement, prior to the training. In that way, the employee would have been given a fair opportunity

to refuse the offer of training should he have felt that any of the conditions attached to it were unacceptable to him for whatever reason.

We have an employee who has just resigned and accepted employment with a competitor. Our line of business is highly competitive we need to protect ourselves in some way. Can we force him to sign a Restraint of Trade Agreement now that he has resigned?

Unfortunately not. It is now for too late, and the horse has escaped. I might add that the employee would indeed be very stupid to sign such an agreement after he has resigned. You cannot force any employee to sign anything that he does not wish to sign.

Payment of remuneration.

An employer is obliged to pay remuneration within 7 days after the completion of the period for which the remuneration is payable. If there is a particular pay date stipulated in any contract of employment or other agreement, then the employer is obliged to adhere to the conditions stipulated. An employer is obliged to provide an employee with a proper payslip on each payday.

Deductionsns from remuneration.

Generally, an employer may not make any deductions from an employee's remuneration without the written consent of the employee, except for statutory deductions such as PAYE, UIF, any deduction required by Court Order, or deductions for retirement fund contributions or medical aid contributions.

Overpayments of remuneration to employee

If an employer inadvertently or erroneously calculates the remuneration due to an employee, which results in an overpayment of remuneration to the employee, then the employer is entitled to recover such overpayment from the employee.

Termination of Employment

Notice periods.

During the first six months of employment, the statutory notice period is 1 week. During the second six months of employment, it is 2 weeks, and thereafter it is 4 weeks. These periods may be varied by the employer in a contract of employment or agreement, provided that the same notice period agreed upon also applies to the employer. For example, the employer may require the employee to give one calendar months notice upon resignation.

If the employer agrees that should the employee be dismissed with notice, then the employer will also provide the employee with one calendar months notice of dismissal. Then the provision for one calendar months notice in the contract of employment is lawful. However, if the employer does not so agree, then that the provision for one calendar months notice in the employment contract is unlawful, and that the notice period as stipulated in the Act will apply.

When can I give notice of resignation?

The Act stipulates that the notice of termination of a contract of employment must be given in writing. Therefore, when an employee resigns, he must tender his resignation in writing to the employer. The Act further stipulates that notice of termination of a contract of employment **given by an employer** may not be given during any period of leave to which the employee is entitled - meaning that the employer may not give an employee notice of dismissal or termination of contract while the employee is on annual leave, maternity leave, or family responsibility leave.

There is no provision in the Act which prohibits **the employee** from giving the employer notice of termination whilst the employee is on any period of leave to which he is entitled. The employer **is permitted** to give the employee notice of termination or dismissal whilst the employee is on **sick leave.** The employer may not insist that an employee must proceed on annual leave during any period of notice, and the employee is prohibited from taking annual leave during a period of notice.

Under certain circumstances, the employer may terminate a contract of employment without notice. There is no provision in the BCEA which entitles an employee to terminate a contract of employment by resignation, without notice. The exception to this may be where the employer has created an intolerable working condition, and the employee has made a decision to resign and leave the premises immediately, and register a dispute of constructive dismissal at the CCMA.

Generally, however, giving the employer 24 hours notice by an employee is unlawful, and should the employee act in that manner, the employer would be entitled to sue the employee for breach of contract.

Payment instead of notice.

Should an employee give notice of resignation, or should the employer give notice of termination of contract or dismissal, and the employer requires the employee to leave the premises immediately, the employer is still obliged to pay the employee for the full period of notice given by the employee.

Should an employee give notice of resignation, but the employee requests to leave the employment immediately, then the employer has the right to grant that request, but then the employer is not obliged to pay the employee for the period of notice given. The employer also has the right to refuse such a request from the employee.

What payments can I expect when I resign ?

Generally, upon resignation or dismissal, an employee is entitled to be paid the notice pay where applicable, salary up to last day worked, plus any outstanding leave pay. Bonuses are normally payable pro rata, but this will depend on the employer's bonus payment policy, and any other bonus payment agreements which may be contained in a contract of employment or collective agreement. Accrued retirement fund benefits will also become payable to the employee in terms of the rules of the fund.

Retrenchment

In terms of retrenchment, the minimum severance pay is 1 week salary for every completed year of service. Severance packages are normally negotiated between employer and employee. The full statutory retrenchment processes are to be found in section 189 and section 189A of the Labour Relations Act.

Miscellaneous.

Salary Increases

Salary increases are not regulated by labour legislation, except in as far as may be provided for in any Main agreement or collective agreement, where provision is usually made for annual wage or salary negotiations. In the absence of any such agreement, salary increases remains a matter of mutual interest between employer and employee. There is no obligation on the employer to grant annual increases.

Salary decreases.

Generally, an employer may not deeply is an employer's salary. However this is subject to many different conditions. For example, the general principle is that an employer may not make unilateral changes to terms and conditions of employment (which include salary) unless the employee is first consulted on the proposed change, and agreement is obtained.

However, if an employee has been lawfully demoted for whatever reason, then obviously the salary applicable to the lower post will apply. There is no obligation on the employer to keep the employee on a salary applicable to a higher post than that occupied by the employee.

This sometimes happens where a sanction of demotion is applied in a disciplinary matter, as an alternative to dismissal. A demotion may also occur by mutual agreement in a case of incapacity - poor work performance - whereby it has been found that an employee is unable to properly perform in a certain post, but is able to perform at a lower level. As an alternative to dismissal, the employee can accept the demotion, but the lower salary applicable to the lower post will apply.

The employee has no legal entitlement to demand that the salary applicable to the higher post or the previously occupied post be applied.

Re-imbursing employer for training costs

Is an employee obliged to reimburse an employer for training costs incurred by the employer, when the employee resigns or is dismissed? The answer here is that should an employer spend money on training and employee, then the employer should enter into a written agreement with the employee before the training commences, to agree on the cost of the training, and to agree that should the employee resigns with in a certain period of time, or be dismissed through no fault of the employer, then the employee would be required to reimburse the employer for the training costs incurred.

If there is no such agreement, then it is implied that the employer is satisfied to spend the money on training the employee, without requiring the employee to reimburse the employer should certain circumstances arise.

If there is no such agreement, the employer is no legal entitlement to demand repayment of training costs purely on the grounds that the employee has now resigned - such requirements must be entered into by written agreement before the training commences. Another reason for this is that the employee must be given opportunity to refuse to undergo the training, and he may well do this if the training is to be very expensive, and the employee has no intentions of remaining in the service of that employer until he retires, but is merely using that employer as a stepping stone in his career path.

Restraint of Trade Agreements.

Strangely, Restraint of Trade Agreements are not regulated in terms of labour legislation, although such agreement is usually form part of the Contract of Employment. The employer will usually require an employee to sign a Restraint of Trade agreement where the employer feels it necessary to restrain the employee party or limit the employee party in his employment activities should he leave the service of the employer.

This requirement would arise where the employer needs to protect his economic interests, trade secrets, secret formulas, price lists, customer database information, and so on. In other words he needs to take certain action to ensure that such information will not fall into the hands of a competitor, should the employee leave his service and take up employment with a competitor.

Such agreement is usually prohibit the employee from taking up employment with a competitor, or supplier, or customer of the employer with in a certain geographical area or with in a certain radius of the employer's premises, for a certain period of time after the employee leaves the service of the employer.

A Restraint of Trade agreement needs to be reasonable in terms of the protection sought, and the applicable terms and conditions as to the geographical area and time period. Usually, in determining the legality and enforce ability of such an agreement, factors that will be considered include the nature of the restricted activity, the geographical area applicable, the period of time for which the agreement is applicable, and the particular interests which the employer is seeking to protect.

Employees often sign that these agreements at the start of employment, and usually they sign the agreement with at giving proper thought to the matter and without giving proper thought to the consequences of signing such an agreement. Usually, the rationale behind the signing is simply “ I signed the because I needed the job.”

The problem is that signing such an agreement for such an arbitrary reason will certainly have, in most cases, an adverse effect on the employee’s future employment with other employers, and on the employee's career advancement. Employees should never sign such agreements without first obtaining professional opinion, by consulting an attorney who specialises in the Law of Contract, to assess the agreement and give a professional opinion.

Re-location of Business.

My employer is re-locating the company from Pretoria to Johannesburg. I live in Pretoria.

Must the employer increase my salary to cover the extra cost of travelling from Pretoria to Johannesburg and back to Pretoria every day ?

Answer – there is no obligation on the employer to do this – it is a matter that must be negotiated between the employee and the employer. My employer is re-locating the company from Pretoria to Johannesburg. I live in Pretoria and if I have to work in Johannesburg, I will have a huge problem in fetching my children from the after-school care centre in Pretoria by 5 pm. Travelling from Johannesburg every day at 4.30 means I won't get to Pretoria until about 6 pm or later. The after-school care centre closes at 5 pm, and they are not prepared to wait for me. In addition, it is simply not practical for me to arrive home at 7 pm or later every day, cook dinner, see to the kids etc.

What can I do?

In terms of labour legislation, the re-location of the business if probably for operational requirements. Since you are unable to now comply with the new operational requirements of the business, the employer would have to retrench you.

Harassment, intimidation, victimization.

It often happens that when an employer wishes to "get rid of" and employee, he adopts tactics that create extremely unpleasant or unacceptable working conditions, in hopes that the employee will resigned. It also happens sometimes when an employee has already resigned, and the employer is extremely annoyed because "the employee is ungrateful", or the employee "has left me in the lurch", and the employer is determined to exact revenge on the employee before they actually leave.

This may take many different forms - it could involve spreading malicious rumours about the employee or insulting them or degrading them, overloading them with work, continually picking on them, swearing at the employee, using foul and vulgar or abusive language towards the employee, and so on.

Whatever the case, it is unacceptable, and is a violation of the human rights of the employee and also a violation of the employee's right to be treated with dignity and respect. In fact, employers have a duty to protect their employees from harassment as opposed to subjecting employees to harassment.

The employee should keep a note of all incidents, noting the date and time, what the nature of the incident was, and the names of any witnesses. The harasser should then be confronted and a formal demand written made to the harasser that he immediately cease the unacceptable behaviour. The employee can state that should the harasser not cease the harassment, the employee will refer the matter to the CCMA for conciliation, and if that fails, the matter will proceed to the Labour Court.

Such correspondence will usually resolve the issue, because the harasser knows that he is out of line, and that his actions are unacceptable.

Everything you need to know about leave

Annual leave entitlement

The Act states that the provisions for annual leave do not apply to an employee who works less than 24 hours per month for an employer, and also these provisions do not apply to leave granted to an employee in excess of the entitlement allowed in terms of the BCEA. An annual leave cycle is a period of 12 months with the same employer, calculated from the employee's commencement of employment, or from the completion of that employees previous leave cycle.

The entitlement is 21 consecutive days annual leave on full remuneration, in respect of each annual leave cycle, and if an employee works a five-day week then this is equal to 15 working days, or if the employee works a six-day week then it is equal to 18 working days. In other words, whatever number of working days falls within the 21 consecutive days, is the number of working days on full pay that the employee must be granted for annual leave purposes.

Calculation of accrual of leave – 1,25 days per month or 1,5 days per month.

If the employee is working a five-day week, then the annual leave will accrue at the rate of 1,25 days per month, and if the employee is working a six-day week then the annual leave will accrue at the rate are of 1,5 days per month.

Calculation of accrual of annual leave – 1 hour for every 17 hours worked .

An alternative method of calculating annual leave has been provided for in the Act, and it would seem that the intention of the legislator, in providing this alternative method of

calculation, was to provide for an easy means of calculating the annual leave for temporary employees, or fixed term employees.

This method makes provision that the annual leave may be calculated on the basis of one hour of annual leave on full remuneration for every 17 hours on which the employee worked, or was entitled to be paid, or it can be calculated on the basis of one day annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid.

This method of accrual may only be applied **by agreement with the employee.** If there is no such agreement, then the employer is obliged to apply the accrual at the rate are of 1,25 days or 1,5 days monthly, as the case may be.

Public holidays falling during a period of annual leave.

Should a public holiday fall during a period whilst an employee is on annual leave, and the public holiday falls on the day on which the employee would ordinarily work, then the employee is entitled to an extra day annual leave for each such public holiday.

When may annual leave be taken?

The employee is entitled to take whatever leave he has accumulated in an annual leave cycle, on consecutive days. This means that if an employee has, for example, accumulated 11 days during an annual leave cycle, he is entitled to take those 11 days consecutively, and the employer may not refuse him permission to take those 11 days consecutively.Annual leave not taken during an annual leave cycle is automatically carried over to the next annual leave cycle, unless there exists any agreement to the contrary.

Section 20 (4) BCEA (**Employer forced to grant leave**)

Should the annual leave be carried over from one cycle to the next, and the employee has still not taken his annual leave from the previous cycle within six months of the new cycle, then the employee can demand to take that annual leave from the previous cycle, and the employer may not refuse such permission.

This is the only condition under which an employer is forced to grant annual leave upon request by the employee. The employer may not require (force) or permit (allow) an employee to take annual leave during any other period of leave to which the employee is entitled.

This means for example, that if an employee is on annual leave, and he falls ill during that period of annual leave, he can visit the doctor and if the doctor certifies that he is unfit for work for a certain period of time, then upon that employees return to work from annual leave he can hand the medical certificate to the employer, and the employer must credit that employee's annual leave with the number of days sick leave, and debit the employee's sick leave.

This also means that if an employee has sick leave days available to his credit, the employer cannot force the employee, nor can he allow the employee, to utilise annual leave instead of taking sick leave.

Annual leave during a period of notice.

The employer may not force and employee to take annual leave during any period of notice, and the employee is prohibited from taking annual leave during any period of notice. Who decides when annual leave can be taken? Section 10 makes provision that the employee and the employer must agree on when annual leave can be taken, and if there is no agreement, then annual leave is taken at the time to suit the employer.

Can I exchange may annual leave for cash?

The employer is prohibited by section 20 (11) from paying an employee for annual leave except upon termination of employment.

Annual leave and shutdown.

Many employers have a shutdown period over December. If this is the case, the employer is entitled to stipulate that annual leave must be taken to coincide with the shutdown period. Should an employee utilize his annual leave at another time during the year, then the shutdown period will be treated as unpaid leave.

Sick leave entitlement

The sick leave entitlement is the number of days that an employee would normally work during a six week period, in every three-year cycle, calculated from the first day of employment. Therefore, if an employee works a five-day week, then six weeks would equate to 30 days, and the employee would therefore be entitled to 30 days sick leave on full pay in every three-year cycle.Sick leave **is not** 10 days per year - sick leave is 30 days per three years. The employer **may not** restrict an employee to taking only 10 days sick leave per year.

During the first six months of employment, the entitlement is 1 day paid sick leave for every 26 days worked, which amounts to approximately 1 day sick leave in every 5 weeks. On the first working day of month number 7, the balance of the 30 days kicks in and is available to the employee. Therefore if the employee took no sick leave during the first six months of employment, then on the first working day of month number seven that employee would have 30 days sick leave available to last him for the balance of 2 ½ years remaining in his first 3-year cycle.

If the employee took say 4 days sick leave during the first six months of employment, then on the first working day of month number seven, that employee would have 26 days sick leave available to last him for the next 2 ½ years.

This amount can be used by the employee at any time during the next 2 ½ years, or three years, as the case may be, but when it is all used up then of course the employee has no further sick leave available until the start of the next 3 year cycle.

If the employee, for example, uses up all his available sick leave in month number 8 of the cycle, then he has no sick leave left until the commencement of the next cycle. Similarly, if the employee uses up all his available sick leave in month number 8, and then in month number 9 he resigns, the employer **may not claim back** any sick leave from that the employee. Any sick leave remaining to the credit of the employee at the end of a sick leave cycle is forfeited, and is not carried over to the next leave cycle.

Any sick leave remaining to the credit of the employee upon termination of the employment agreement by either party, is forfeited and the employee is not entitled to receive any payment for any sick leave days outstanding to the employee's credit.

Medical certificates

An employee who is off sick for more than 2 consecutive days (in other words, 3 days or more) is required to produce a medical certificate signed by a medical practitioner or any other person who is certified to diagnose and treat patients, and who is registered with a professional council established by an Act of Parliament.

In other words, a medical certificate signed by a clinic sister or traditional healer is not acceptable. If the employee does not produce the required medical certificate as above, then the employer is entitled to treat the period of absence as unpaid leave, and the employee is not entitled to request that it be taken as paid annual leave.

It is unlawful for an employer to insist that an employee produce a medical certificate for an absence on a Friday, or on a Monday, or on the Friday **and** the Monday, or for and absence on the day before or the day after a public holiday.

If an employee is absent on more than two occasions (even if only for one day) during the same eight-week period, then for further absence, the employer is entitled to insist on a medical certificate, even if the absence is for only one day, and if it is not produced, then the employer is entitled to treat that absence as unpaid leave.

Injury on duty and sick leave.

If an employee is unable to work because of an accident or occupational disease, as defined in the Compensation for Occupational Injuries and Diseases Act, then any period of absence is not taken from ordinarily sick leave, unless there is no compensation payable in terms of the Act.

Maternity leave entitlement

Maternity leave is for months unpaid leave. The maternity leave should commence one month before the expected date of birth of the child, and that the mother may not return to work for six weeks after the birth of the child. These periods may be varied upon written permission from a doctor or midwife.The Act does not stipulate at what stage of the pregnancy the employee is obliged to inform the employer of her pregnant condition.

The Act stipulates only that the employee must notify the employer in writing of the date on which the employee intends to commence maternity leave, and the date on which the employee intends to return to work.

The Act stipulates further that the above a written notice must be given to the employer at least four weeks before the commencement of the maternity leave. An employer is

obliged to keep the employee's job open, and no employee may be dismissed on grounds of pregnancy, or for any reason in relation to pregnancy or intended pregnancy. Any arrangements between the employer and employee regarding payment of salary or benefits during maternity leave, remains a matter between employer and employee and has nothing to do with any provision of the Act. The employee must inquire at the Department of Labour regarding maternity benefits payable in terms of UIF.

Family Responsibility leave

Family responsibility leave is presently an allowance of 3 days on full pay per year, and if the employee does not utilise the family responsibility leave during any 1 year, then any part of the allowance remaining at the end of the year is forfeited and is not carried over to the next year. Family responsibility leave is available only to employees who have been in employment with the same employer for longer than 4 months, and who work more than 4 days per week for that the employer.

Family responsibility leave may be used when the employee's child is born, when the employee's child is sick, or upon the death of the employee's spouse or life partner, or the employee's parent, adoptive parent, grandparent, adopted child, grandchild or sibling. An employee is entitled to take family responsibility leave as a ½ day, if that is all that is required. The employer is entitled to ask for proof of the event for which the family responsibility leave is sought, such as a medical certificate or death certificate. Family responsibility leave may not be claimed for any reason other than the reasons stated above.

Unpaid leave

There is no provision in the BCEA which entitles an employee to take unpaid leave. Unpaid leave is referred to in the Act only in terms of what the employer is entitled to do when an employee's sick leave or annual leave has been exhausted - the employer may then allow (or require) the employee to take unpaid leave. However, there is no provision in the Act that allows an employee **to demand** that he/she be permitted to take unpaid leave.

Study Leave

Very simply, in labour legislation there is no such thing as study leave - it does not exist. Therefore, if the employee has such a requirement, he must apply for paid annual leave in accordance with the employer's annual leave policy.

Frequently Asked Questions

I have resigned and have 25 days leave due to me. Can I take this leave during

my notice period ? I have told my employer I want to take my leave in my period of notice but he refuses.

Section 20 (5) (b) of the BCEA states clearly that "the employer may not require or permit an employee to take annual leave during any period of notice of termination of employment."

This means that, in terms of the act, an employee is prohibited from taking leave during his period of notice on resignation, and the employer is prohibited from forcing the employee to take leave during any period of notice.

We have an employee who has given us four weeks notice, but the employment contract states one calendar month - what can we do ?

The conditions of the employment contract are lawful, provided that the period of notice applies to the employer - namely that if the employee should be retrenched or dismissed with notice, then the employer is obliged to also give the employee one calendar months notice. If the condition applies to both parties, then the employer can force the employee to comply with the condition. Should the employee refuse and simply walked out, the only thing the employer can do is sue the employee for damages in terms of breach of contract.

We have a clause in our contract stating that employees who earn over the threshold amount as determined by the Minister, are exempted from the provisions relating to maternity leave. The clause states further that the company will stipulate what period of maternity leave they are prepared to allow. Is this legal?

This is not correct. Section 25, which sets out the provisions for maternity leave, he is not stipulated as an exclusion in the Ministerial determination. All employees, irrespective of earnings, are entitled to 4 months unpaid maternity leave in terms of the BCEA. There is no legal obligation on any employer to pay the employee a salary or portion of salary during a period of maternity leave, but the employer is legally obliged to allow the employee the full period of four months as a minimum.

We have an employee who has exhausted all their sick leave for this three-year cycle, as well as the annual leave for the current cycle. The employee now needs to go into hospital for an operation and will be off work for six weeks. Are we obliged to pay him ?

Unfortunately, if all sick leave has been exhausted as well as all available annual leave in the current cycles, and the employee requires further sick leave, there is no legal obligation on the employer to pay the employee and the additional requirement may be treated as unpaid leave.

We have a clause in our employment contract stating that if an employee is off sick on a Friday or a Monday, or on the Friday and a Monday, or if he is off sick the day before the day after a public holiday, he must produce a sick note, otherwise be time-off will be treated as unpaid leave. Is this condition legal?

Unfortunately, it is not a lawful condition. The BCEA states clearly in the section 23 that if an employee has been absent from work for more than two consecutive days (which means three days or more) then he is obliged to produce a medical certificate. A Friday is 1 day only, and a Monday is 1 day only, and the same applies to the day before and the day after a public holiday - those days each constitute only 1 day, and therefore no medical certificate is required. However, if the employee is absent on more than two **occasions** - even if the occasion is 1 day only - during the same eight-week period, then on the third occasion of absence during that eight-week period the employer is entitled to insist on a sick note, and if it is not produced, the employer is not obliged to pay the employee for the time-off.

We have an employee who has resigned and walked out on 24 hours notice. He has already been paid his salary, but he is owed 15 days leave. Can we withhold his leave pay in lieu of notice?

Unfortunately you are not permitted to do that. Section 40 of the BCEA makes it clear what payments must be made to an employee upon termination of employment, and this includes outstanding leave pay. The only way this can be overcome is if it is inserted into the employment contract as a condition of employment that should the employee contravene the provisions regarding the period of notice required, then the employer would be entitled to withhold salary or leave pay in lieu of notice. However, you would not be entitled to now rush out and amend all your existing employment contracts. If you wish to do that, it can only be done by consultation with your existing employees.

We have an employee who has been with us for 12 months. We sent him on a training course when he joined us, which cost us R8000. He has now resigned - can we make him pay us back for the cost of the training course?

If no (preferably written) agreement was entered into before the employee embarked on the training, to the effect that he would be liable to repay you for the cost of the training should he leave your employment, then there is nothing you can do.

You can't force such a condition on him now because it is after the fact. The conditions attached to the training should have been made clear to the employee in an agreement, prior to the training. In that way, the employee would have been given a fair opportunity

to refuse the offer of training should he have felt that any of the conditions attached to it were unacceptable to him for whatever reason.

We have an employee who has just resigned and accepted employment with a competitor. Our line of business is highly competitive we need to protect ourselves in some way. Can we force him to sign a Restraint of Trade Agreement now that he has resigned?

Unfortunately not. It is now for too late, and the horse has escaped. I might add that the employee would indeed be very stupid to sign such an agreement after he has resigned. You cannot force any employee to sign anything that he does not wish to sign.

Payment of remuneration.

An employer is obliged to pay remuneration within 7 days after the completion of the period for which the remuneration is payable. If there is a particular pay date stipulated in any contract of employment or other agreement, then the employer is obliged to adhere to the conditions stipulated. An employer is obliged to provide an employee with a proper payslip on each payday.

Deductionsns from remuneration.

Generally, an employer may not make any deductions from an employee's remuneration without the written consent of the employee, except for statutory deductions such as PAYE, UIF, any deduction required by Court Order, or deductions for retirement fund contributions or medical aid contributions.

Overpayments of remuneration to employee

If an employer inadvertently or erroneously calculates the remuneration due to an employee, which results in an overpayment of remuneration to the employee, then the employer is entitled to recover such overpayment from the employee.

Termination of Employment

Notice periods.

During the first six months of employment, the statutory notice period is 1 week. During the second six months of employment, it is 2 weeks, and thereafter it is 4 weeks. These periods may be varied by the employer in a contract of employment or agreement, provided that the same notice period agreed upon also applies to the employer. For example, the employer may require the employee to give one calendar months notice upon resignation.

If the employer agrees that should the employee be dismissed with notice, then the employer will also provide the employee with one calendar months notice of dismissal. Then the provision for one calendar months notice in the contract of employment is lawful. However, if the employer does not so agree, then that the provision for one calendar months notice in the employment contract is unlawful, and that the notice period as stipulated in the Act will apply.

When can I give notice of resignation?

The Act stipulates that the notice of termination of a contract of employment must be given in writing. Therefore, when an employee resigns, he must tender his resignation in writing to the employer. The Act further stipulates that notice of termination of a contract of employment **given by an employer** may not be given during any period of leave to which the employee is entitled - meaning that the employer may not give an employee notice of dismissal or termination of contract while the employee is on annual leave, maternity leave, or family responsibility leave.

There is no provision in the Act which prohibits **the employee** from giving the employer notice of termination whilst the employee is on any period of leave to which he is entitled. The employer **is permitted** to give the employee notice of termination or dismissal whilst the employee is on **sick leave.** The employer may not insist that an employee must proceed on annual leave during any period of notice, and the employee is prohibited from taking annual leave during a period of notice.

Under certain circumstances, the employer may terminate a contract of employment without notice. There is no provision in the BCEA which entitles an employee to terminate a contract of employment by resignation, without notice. The exception to this may be where the employer has created an intolerable working condition, and the employee has made a decision to resign and leave the premises immediately, and register a dispute of constructive dismissal at the CCMA.

Generally, however, giving the employer 24 hours notice by an employee is unlawful, and should the employee act in that manner, the employer would be entitled to sue the employee for breach of contract.

Payment instead of notice.

Should an employee give notice of resignation, or should the employer give notice of termination of contract or dismissal, and the employer requires the employee to leave the premises immediately, the employer is still obliged to pay the employee for the full period of notice given by the employee.

Should an employee give notice of resignation, but the employee requests to leave the employment immediately, then the employer has the right to grant that request, but then the employer is not obliged to pay the employee for the period of notice given. The employer also has the right to refuse such a request from the employee.

What payments can I expect when I resign ?

Generally, upon resignation or dismissal, an employee is entitled to be paid the notice pay where applicable, salary up to last day worked, plus any outstanding leave pay. Bonuses are normally payable pro rata, but this will depend on the employer's bonus payment policy, and any other bonus payment agreements which may be contained in a contract of employment or collective agreement. Accrued retirement fund benefits will also become payable to the employee in terms of the rules of the fund.

Retrenchment

In terms of retrenchment, the minimum severance pay is 1 week salary for every completed year of service. Severance packages are normally negotiated between employer and employee. The full statutory retrenchment processes are to be found in section 189 and section 189A of the Labour Relations Act.

Miscellaneous.

Salary Increases

Salary increases are not regulated by labour legislation, except in as far as may be provided for in any Main agreement or collective agreement, where provision is usually made for annual wage or salary negotiations. In the absence of any such agreement, salary increases remains a matter of mutual interest between employer and employee. There is no obligation on the employer to grant annual increases.

Salary decreases.

Generally, an employer may not deeply is an employer's salary. However this is subject to many different conditions. For example, the general principle is that an employer may not make unilateral changes to terms and conditions of employment (which include salary) unless the employee is first consulted on the proposed change, and agreement is obtained.

However, if an employee has been lawfully demoted for whatever reason, then obviously the salary applicable to the lower post will apply. There is no obligation on the employer to keep the employee on a salary applicable to a higher post than that occupied by the employee.

This sometimes happens where a sanction of demotion is applied in a disciplinary matter, as an alternative to dismissal. A demotion may also occur by mutual agreement in a case of incapacity - poor work performance - whereby it has been found that an employee is unable to properly perform in a certain post, but is able to perform at a lower level. As an alternative to dismissal, the employee can accept the demotion, but the lower salary applicable to the lower post will apply.

The employee has no legal entitlement to demand that the salary applicable to the higher post or the previously occupied post be applied.

Re-imbursing employer for training costs

Is an employee obliged to reimburse an employer for training costs incurred by the employer, when the employee resigns or is dismissed? The answer here is that should an employer spend money on training and employee, then the employer should enter into a written agreement with the employee before the training commences, to agree on the cost of the training, and to agree that should the employee resigns with in a certain period of time, or be dismissed through no fault of the employer, then the employee would be required to reimburse the employer for the training costs incurred.

If there is no such agreement, then it is implied that the employer is satisfied to spend the money on training the employee, without requiring the employee to reimburse the employer should certain circumstances arise.

If there is no such agreement, the employer is no legal entitlement to demand repayment of training costs purely on the grounds that the employee has now resigned - such requirements must be entered into by written agreement before the training commences. Another reason for this is that the employee must be given opportunity to refuse to undergo the training, and he may well do this if the training is to be very expensive, and the employee has no intentions of remaining in the service of that employer until he retires, but is merely using that employer as a stepping stone in his career path.

Restraint of Trade Agreements.

Strangely, Restraint of Trade Agreements are not regulated in terms of labour legislation, although such agreement is usually form part of the Contract of Employment. The employer will usually require an employee to sign a Restraint of Trade agreement where the employer feels it necessary to restrain the employee party or limit the employee party in his employment activities should he leave the service of the employer.

This requirement would arise where the employer needs to protect his economic interests, trade secrets, secret formulas, price lists, customer database information, and so on. In other words he needs to take certain action to ensure that such information will not fall into the hands of a competitor, should the employee leave his service and take up employment with a competitor.

Such agreement is usually prohibit the employee from taking up employment with a competitor, or supplier, or customer of the employer with in a certain geographical area or with in a certain radius of the employer's premises, for a certain period of time after the employee leaves the service of the employer.

A Restraint of Trade agreement needs to be reasonable in terms of the protection sought, and the applicable terms and conditions as to the geographical area and time period. Usually, in determining the legality and enforce ability of such an agreement, factors that will be considered include the nature of the restricted activity, the geographical area applicable, the period of time for which the agreement is applicable, and the particular interests which the employer is seeking to protect.

Employees often sign that these agreements at the start of employment, and usually they sign the agreement with at giving proper thought to the matter and without giving proper thought to the consequences of signing such an agreement. Usually, the rationale behind the signing is simply “ I signed the because I needed the job.”

The problem is that signing such an agreement for such an arbitrary reason will certainly have, in most cases, an adverse effect on the employee’s future employment with other employers, and on the employee's career advancement. Employees should never sign such agreements without first obtaining professional opinion, by consulting an attorney who specialises in the Law of Contract, to assess the agreement and give a professional opinion.

Re-location of Business.

My employer is re-locating the company from Pretoria to Johannesburg. I live in Pretoria.

Must the employer increase my salary to cover the extra cost of travelling from Pretoria to Johannesburg and back to Pretoria every day ?

Answer – there is no obligation on the employer to do this – it is a matter that must be negotiated between the employee and the employer. My employer is re-locating the company from Pretoria to Johannesburg. I live in Pretoria and if I have to work in Johannesburg, I will have a huge problem in fetching my children from the after-school care centre in Pretoria by 5 pm. Travelling from Johannesburg every day at 4.30 means I won't get to Pretoria until about 6 pm or later. The after-school care centre closes at 5 pm, and they are not prepared to wait for me. In addition, it is simply not practical for me to arrive home at 7 pm or later every day, cook dinner, see to the kids etc.

What can I do?

In terms of labour legislation, the re-location of the business if probably for operational requirements. Since you are unable to now comply with the new operational requirements of the business, the employer would have to retrench you.

Harassment, intimidation, victimization.

It often happens that when an employer wishes to "get rid of" and employee, he adopts tactics that create extremely unpleasant or unacceptable working conditions, in hopes that the employee will resigned. It also happens sometimes when an employee has already resigned, and the employer is extremely annoyed because "the employee is ungrateful", or the employee "has left me in the lurch", and the employer is determined to exact revenge on the employee before they actually leave.

This may take many different forms - it could involve spreading malicious rumours about the employee or insulting them or degrading them, overloading them with work, continually picking on them, swearing at the employee, using foul and vulgar or abusive language towards the employee, and so on.

Whatever the case, it is unacceptable, and is a violation of the human rights of the employee and also a violation of the employee's right to be treated with dignity and respect. In fact, employers have a duty to protect their employees from harassment as opposed to subjecting employees to harassment.

The employee should keep a note of all incidents, noting the date and time, what the nature of the incident was, and the names of any witnesses. The harasser should then be confronted and a formal demand written made to the harasser that he immediately cease the unacceptable behaviour. The employee can state that should the harasser not cease the harassment, the employee will refer the matter to the CCMA for conciliation, and if that fails, the matter will proceed to the Labour Court.

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The entitlement is 21 consecutive days annual leave on full remuneration, in respect of each annual leave cycle, and if an employee works a five-day week then this is equal to 15 working days, or if the employee works a six-day week then it is equal to 18 working days. In other words, whatever number of working days falls within the 21 consecutive days, is the number of working days on full pay that the employee must be granted for annual leave purposes.

Calculation of accrual of leave – 1,25 days per month or 1,5 days per month.

If the employee is working a five-day week, then the annual leave will accrue at the rate of 1,25 days per month, and if the employee is working a six-day week then the annual leave will accrue at the rate are of 1,5 days per month.

Calculation of accrual of annual leave – 1 hour for every 17 hours worked .

An alternative method of calculating annual leave has been provided for in the Act, and it would seem that the intention of the legislator, in providing this alternative method of

calculation, was to provide for an easy means of calculating the annual leave for temporary employees, or fixed term employees.

This method makes provision that the annual leave may be calculated on the basis of one hour of annual leave on full remuneration for every 17 hours on which the employee worked, or was entitled to be paid, or it can be calculated on the basis of one day annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid.

This method of accrual may only be applied **by agreement with the employee.** If there is no such agreement, then the employer is obliged to apply the accrual at the rate are of 1,25 days or 1,5 days monthly, as the case may be.

Public holidays falling during a period of annual leave.

Should a public holiday fall during a period whilst an employee is on annual leave, and the public holiday falls on the day on which the employee would ordinarily work, then the employee is entitled to an extra day annual leave for each such public holiday.

When may annual leave be taken?

The employee is entitled to take whatever leave he has accumulated in an annual leave cycle, on consecutive days. This means that if an employee has, for example, accumulated 11 days during an annual leave cycle, he is entitled to take those 11 days consecutively, and the employer may not refuse him permission to take those 11 days consecutively.Annual leave not taken during an annual leave cycle is automatically carried over to the next annual leave cycle, unless there exists any agreement to the contrary.

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Should the annual leave be carried over from one cycle to the next, and the employee has still not taken his annual leave from the previous cycle within six months of the new cycle, then the employee can demand to take that annual leave from the previous cycle, and the employer may not refuse such permission.

This is the only condition under which an employer is forced to grant annual leave upon request by the employee. The employer may not require (force) or permit (allow) an employee to take annual leave during any other period of leave to which the employee is entitled.

This means for example, that if an employee is on annual leave, and he falls ill during that period of annual leave, he can visit the doctor and if the doctor certifies that he is unfit for work for a certain period of time, then upon that employees return to work from annual leave he can hand the medical certificate to the employer, and the employer must credit that employee's annual leave with the number of days sick leave, and debit the employee's sick leave.

This also means that if an employee has sick leave days available to his credit, the employer cannot force the employee, nor can he allow the employee, to utilise annual leave instead of taking sick leave.

Annual leave during a period of notice.

The employer may not force and employee to take annual leave during any period of notice, and the employee is prohibited from taking annual leave during any period of notice. Who decides when annual leave can be taken? Section 10 makes provision that the employee and the employer must agree on when annual leave can be taken, and if there is no agreement, then annual leave is taken at the time to suit the employer.

Can I exchange may annual leave for cash?

The employer is prohibited by section 20 (11) from paying an employee for annual leave except upon termination of employment.

Annual leave and shutdown.

Many employers have a shutdown period over December. If this is the case, the employer is entitled to stipulate that annual leave must be taken to coincide with the shutdown period. Should an employee utilize his annual leave at another time during the year, then the shutdown period will be treated as unpaid leave.

Sick leave entitlement

The sick leave entitlement is the number of days that an employee would normally work during a six week period, in every three-year cycle, calculated from the first day of employment. Therefore, if an employee works a five-day week, then six weeks would equate to 30 days, and the employee would therefore be entitled to 30 days sick leave on full pay in every three-year cycle.Sick leave **is not** 10 days per year - sick leave is 30 days per three years. The employer **may not** restrict an employee to taking only 10 days sick leave per year.

During the first six months of employment, the entitlement is 1 day paid sick leave for every 26 days worked, which amounts to approximately 1 day sick leave in every 5 weeks. On the first working day of month number 7, the balance of the 30 days kicks in and is available to the employee. Therefore if the employee took no sick leave during the first six months of employment, then on the first working day of month number seven that employee would have 30 days sick leave available to last him for the balance of 2 ½ years remaining in his first 3-year cycle.

If the employee took say 4 days sick leave during the first six months of employment, then on the first working day of month number seven, that employee would have 26 days sick leave available to last him for the next 2 ½ years.

This amount can be used by the employee at any time during the next 2 ½ years, or three years, as the case may be, but when it is all used up then of course the employee has no further sick leave available until the start of the next 3 year cycle.

If the employee, for example, uses up all his available sick leave in month number 8 of the cycle, then he has no sick leave left until the commencement of the next cycle. Similarly, if the employee uses up all his available sick leave in month number 8, and then in month number 9 he resigns, the employer **may not claim back** any sick leave from that the employee. Any sick leave remaining to the credit of the employee at the end of a sick leave cycle is forfeited, and is not carried over to the next leave cycle.

Any sick leave remaining to the credit of the employee upon termination of the employment agreement by either party, is forfeited and the employee is not entitled to receive any payment for any sick leave days outstanding to the employee's credit.

Medical certificates

An employee who is off sick for more than 2 consecutive days (in other words, 3 days or more) is required to produce a medical certificate signed by a medical practitioner or any other person who is certified to diagnose and treat patients, and who is registered with a professional council established by an Act of Parliament.

In other words, a medical certificate signed by a clinic sister or traditional healer is not acceptable. If the employee does not produce the required medical certificate as above, then the employer is entitled to treat the period of absence as unpaid leave, and the employee is not entitled to request that it be taken as paid annual leave.

It is unlawful for an employer to insist that an employee produce a medical certificate for an absence on a Friday, or on a Monday, or on the Friday **and** the Monday, or for and absence on the day before or the day after a public holiday.

If an employee is absent on more than two occasions (even if only for one day) during the same eight-week period, then for further absence, the employer is entitled to insist on a medical certificate, even if the absence is for only one day, and if it is not produced, then the employer is entitled to treat that absence as unpaid leave.

Injury on duty and sick leave.

If an employee is unable to work because of an accident or occupational disease, as defined in the Compensation for Occupational Injuries and Diseases Act, then any period of absence is not taken from ordinarily sick leave, unless there is no compensation payable in terms of the Act.

Maternity leave entitlement

Maternity leave is for months unpaid leave. The maternity leave should commence one month before the expected date of birth of the child, and that the mother may not return to work for six weeks after the birth of the child. These periods may be varied upon written permission from a doctor or midwife.The Act does not stipulate at what stage of the pregnancy the employee is obliged to inform the employer of her pregnant condition.

The Act stipulates only that the employee must notify the employer in writing of the date on which the employee intends to commence maternity leave, and the date on which the employee intends to return to work.

The Act stipulates further that the above a written notice must be given to the employer at least four weeks before the commencement of the maternity leave. An employer is

obliged to keep the employee's job open, and no employee may be dismissed on grounds of pregnancy, or for any reason in relation to pregnancy or intended pregnancy. Any arrangements between the employer and employee regarding payment of salary or benefits during maternity leave, remains a matter between employer and employee and has nothing to do with any provision of the Act. The employee must inquire at the Department of Labour regarding maternity benefits payable in terms of UIF.

Family Responsibility leave

Family responsibility leave is presently an allowance of 3 days on full pay per year, and if the employee does not utilise the family responsibility leave during any 1 year, then any part of the allowance remaining at the end of the year is forfeited and is not carried over to the next year. Family responsibility leave is available only to employees who have been in employment with the same employer for longer than 4 months, and who work more than 4 days per week for that the employer.

Family responsibility leave may be used when the employee's child is born, when the employee's child is sick, or upon the death of the employee's spouse or life partner, or the employee's parent, adoptive parent, grandparent, adopted child, grandchild or sibling. An employee is entitled to take family responsibility leave as a ½ day, if that is all that is required. The employer is entitled to ask for proof of the event for which the family responsibility leave is sought, such as a medical certificate or death certificate. Family responsibility leave may not be claimed for any reason other than the reasons stated above.

Unpaid leave

There is no provision in the BCEA which entitles an employee to take unpaid leave. Unpaid leave is referred to in the Act only in terms of what the employer is entitled to do when an employee's sick leave or annual leave has been exhausted - the employer may then allow (or require) the employee to take unpaid leave. However, there is no provision in the Act that allows an employee **to demand** that he/she be permitted to take unpaid leave.

Study Leave

Very simply, in labour legislation there is no such thing as study leave - it does not exist. Therefore, if the employee has such a requirement, he must apply for paid annual leave in accordance with the employer's annual leave policy.

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14 GENERAL PROVISIONS

14.1 Service

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14.1.2 Where service is effected at a *domicilium citandi et executandi*, the original document (or a copy with an affidavit explaining the absence of the original) wherein the *domicilium* is chosen must be placed in the court file.

14.1.3 In applications for committal or some other penalty for contempt of court, personal service of the application must be effected on the respondent.

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14.1.4 When service of any document by registered post is prescribed or authorised (in any action or application), service is proved by the production of an affidavit by the person who procured the despatch of such document, in which that person:
indicates the date of despatch together with the name and address of the addressee;

describes the document so despatched;

indicates, if necessary, that the item in question has not been returned to the sender by the Post Office as being undelivered; and

annexes the documentary proof of posting of a registered article issued by the Post Office.

14.1.5 When a party serves any document by fax in terms of Rule 4, the deponent to any affidavit filed in terms of Rule 4(2) (b) must, in addition to providing proof of the correct fax number and confirmation that the whole of the transmission was completed, state under oath that the party to whom the fax was addressed telephonically confirmed receipt of the whole of the fax transmission and the name of the person who confirmed receipt of the transmission.
14.2 **Settlement**
14.2.1 The registrar must be informed telephonically immediately when it becomes known that a matter has become settled. Subsequent to the allocation of a matter to a particular judge for hearing, either the registrar or the secretary of the judge to whom the matter has been allocated, must be immediately informed telephonically that the matter has become settled.
14.2.2 A Judge will only make such settlement agreement an order of court if:
the representatives of all the parties to the application are present in court and confirm the signature of their respective clients to the settlement agreement and that their clients want the settlement agreement made an order of court; or
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proof is provided to the satisfaction of the presiding judge as to the identity of the person who signed the settlement agreement and that the parties thereto want the settlement made an order of court.

14.2.3 If the parties to an application have settled the application on the terms set out in a draft order, a judge will only make the draft order an order of court if:
the representatives of all the parties to the application are present in court and confirm that the draft order correctly reflects the term agreed upon; or

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14.3 Noting Judgments
14.3.1 Parties will be given a reasonable notice of the handing down of judgments.
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14.4.1 If there is no appearance when a matter is called it may there and then be struck from the roll.
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14.5 *Ex tempore* judgments

When *ex tempore* judgments are handed down, it is the responsibility of the parties to arrange for the transcript of the judgment. Awaiting the transcript does not delay the time periods from continuing to run. The time periods run from the day the judgment was handed down.

15. APPLICATIONS FOR LEAVE TO APPEAL

15.1 A copy of any application for leave to appeal filed in terms of Rule 30 must also be served on the secretary to the judge from whom leave to appeal is sought. If the judge‟s secretary is not available, it may be served on the secretary of any other judge in the seat where the matter was heard.

15.2 Within 10 days of the filing of the application for leave to appeal, the party seeking leave must file its submissions in terms of Rule 30(3A) and the party opposing the leave must file its submissions five days thereafter. An application for leave to appeal will be decided by the judge in Chambers on the basis of the submissions filed in terms of Rule 30 (3A), unless the judge directs that the application be heard in open court.

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16.1 In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:

in the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed;

in the case of referrals in terms of Rule 6, when a period of six months has elapsed from the date of delivery of a statement of case without any steps taken by the referring party from the date on which the

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statement of claim was filed, or the date on which the last process was filed; and

when a party fails to comply with a direction issued by a judge within the stipulated time limit.

16.2 A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision.
16.3 Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed.

17. *PRO BONO* EXEMPTION

In matters where one or both of the parties are represented by practitioners acting *pro bono*, a judge may grant an exemption from the full or partial application of the relevant portions of this manual, including issuing directives regarding *inter alia* the preparation of the record, indexing and pagination of the papers and the conduct of pre-trial conferences, as well as the need to file heads of argument.
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FORM “A”
APPLICATION FOR DEFAULT JUDGEMENT
IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG / CAPE TOWN / DURBAN / PORT ELIZABETH
Case no.....
In the matter between
..... Applicant
and
.....
Respondent
APPLICATION FO DEFAULT JUDGMENT
[1] The referral having being duly served on the Respondent.
[2] The time for giving notice to oppose the referral having expired on .....
.....
[3].The respondent has not given notice to oppose the matter.
[4].The applicant hereby applies for judgment by default against the respondent as claimed in the referral.
[5] An affidavit in support of this application is filed herewith marked „A”.
Dated this ..... day of ..... 20.....

_____
Sign
Name and address of .....
.....
Applicant/Applicants“ representative.....
.....
Telephone/fax no./ e-mail address.....
..... 36

Affidavit

_____

I the undersigned (full names)_____do hereby make oath and state:

1. I am the applicant in the matter and the facts contained herein are within my own knowledge and to the best of my belief true and correct. 2. I hereby confirm the correctness of the facts averred in my statement of case and the relief sought and further confirm that service of the statement of case has been properly affected as provided in the rules of this Court upon the respondent. 3. At the time of my dismissal my gross remuneration was the sum of R___ per month. Since my dismissal I have been employed as from _date/s_____. I have earned a total amount of R_____ from the date of my dismissal to the date of signing this affidavit. 4. I seek the relief as prayed for in my statement of case.

_____ Applicant

Signed and sworn before me on this day of 201 the deponent having declared that he knew and understood the contents of the affidavit, that he had no objection to taking the oath, considered the oath binding on his conscience and utter the words “so help me God”

_____ Commissioner of Oaths (Stamp) 37

FORM B

Usual Heading

TAKE NOTICE that an application will be made on 10 May 2012 for an order in the following terms:

(i) that the respondent be placed under provisional liquidation and in the hands of the Master of the High Court;

(ii) that a rule nisi is issued, calling upon all interested parties to appear and show cause, if any, to this Honourable Court on at 10 am or so soon as the matter may be heard why a final order of liquidation should not be granted, and why the costs of this application should not be costs in the liquidation;

(iii) that of , failing him a person nominated by the Master of the High Court, be appointed liquidator to wind up the respondents‟ estate on such terms and conditions as the Master deems appropriate;

(iv) that the Registrar of the Labour Court alternatively the Master of the High Court determine the liquidator‟s fees for winding up the respondent.

(v) Service of this order should be affected:

(a) by the Sheriff on the respondent at its registered office; being ….;

(b) by the Sheriff placing a copy of this order on the notice board or a prominent place within the respondents premises which is accessible to all its staff and members visiting it;

(c) by prepaid registered post to all businesses [who are members, (where the respondent is an employers‟ organisation), or where the respondent has members (where the respondent is a trade union)]

(vi) publication in the Times Newspaper. 38

TAKE NOTICE further that the affidavit of John Jones will be used in support of the application.
To: Registrar Labour Court
To: Registrar
To: Respondent 39

Supporting affidavit

Affidavit

Other than the allegations necessary to obtain a winding up order the following must be included:

Mr Peter Shabalala of XYZ Trustees, an experienced practitioner in winding up of liquidated businesses, has agreed to take up the appointment as liquidator to wind up the respondent as can be seen from the letter forwarded by him annexed hereto marked **“A”**

That I have provided security to the satisfaction of the Master of the High Court to proceed with the application as can be seen in the document annexed hereto marked **“B”**

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and
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[5] An affidavit in support of this application is filed herewith marked „A”.
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I the undersigned (full names)_____do hereby make oath and state:

1. I am the applicant in the matter and the facts contained herein are within my own knowledge and to the best of my belief true and correct. 2. I hereby confirm the correctness of the facts averred in my statement of case and the relief sought and further confirm that service of the statement of case has been properly affected as provided in the rules of this Court upon the respondent. 3. At the time of my dismissal my gross remuneration was the sum of R___ per month. Since my dismissal I have been employed as from _date/s_____. I have earned a total amount of R_____ from the date of my dismissal to the date of signing this affidavit. 4. I seek the relief as prayed for in my statement of case.

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(iv) that the Registrar of the Labour Court alternatively the Master of the High Court determine the liquidator‟s fees for winding up the respondent.

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_____

Deponent

The labour dispute system – how it works

Ivan Israelstam

The Labour Relations Act of 1995 (LRA) makes it very easy for employees to challenge alleged unfair dismissals and other unfair practices at private or statutory dispute resolution forums. Such disputes may, by agreement, be dealt with via private (non-statutory) dispute resolution forums such as AMSA, AFSA, Tokiso and others. On the other hand the statutory dispute resolution forums established by the LRA include:

- The dispute resolution arms of bargaining councils (BC) in certain industries including, for example, the metal and engineering, motor, public service and chemical industries.
- The Commission for Conciliation, Mediation and Arbitration (CCMA) for those industries that do not have their own bargaining councils (e.g. retail, IT, security, financial services and others)
- The Labour Court
- The Labour Appeal Court.

The process is that:

- The aggrieved employee must start off by completing a dispute referral form and lodge it with the relevant BC or with the CCMA.
- A conciliation meeting is set up where a mediator is appointed to attempt to facilitate an out-of-court settlement.
- If this is successful the employer and employee sign a contract setting out the terms of their settlement agreement and the matter is then closed.

- If conciliation fails to resolve the dispute the employee may refer it to the next level which, depending on the nature of the dispute, will either be an arbitration tribunal (similar to a junior court) or to the Labour Court (the more senior dispute resolution forum). The matter will go to the Labour Court instead of to arbitration if the dispute relates to matters such as multiple retrenchment, strike dismissals or automatically unfair dismissals. The arbitration or Labour Court hearing would normally take place at a later date.

- Alternatively, the CCMA may set the matter down as a con/arb. In such a case, unless one of the parties objects, the arbitration would take place immediately that conciliation fails.

- At arbitration or Labour Court the arbitrator or judge hears evidence from the employer and employee and decides whether the dismissal or other act was fair or not.

- Once an arbitrator has communicated his/her decision to the parties either of them may, if dissatisfied, apply for a review at the Labour Court. For example, should either party have evidence that the arbitrator accepted a bribe, was biased, ignored relevant evidence, refused to listen to relevant evidence, assisted the other party unduly or otherwise acted wrongly, it may apply to the Labour Court to set aside the arbitrator's decision.

- Any decision of the Labour Court may be referred to the Labour Appeal Court and could be referred even higher to the Supreme Court of Appeal and to the Constitutional Court as occurred in the case of Sidumo vs Rustenburg Platinum Mines Ltd.

When a dismissal dispute is referred to arbitration or Labour Court the employee only has to prove that he/she was, in fact, dismissed. Then the employer has to prove that the dismissal was both procedurally and substantively fair. And the employer normally has to provide such proof before hearing the employee's evidence as to why he/she has alleged that the dismissal was unfair.

This means that the employer is assumed guilty of unfair dismissal until it proves itself innocent; but also has to present its case first. Thus the employer is in a seriously disadvantaged position.

At conciliation the employee may be represented only by himself/herself or by a union official. The employer may represent itself or be represented by an official of an employer's organisation.

At arbitration lawyers may be allowed if:

- The dispute is not a matter of misconduct or incapacity OR

- The arbitrator allows lawyers due to the legal complexity of the matter or to 'uneven playing fields'.

Employers are therefore advised to join registered employersorganisations in order to avoid the uncertainty of being allowed representation.

Ivan Israelstam is the Chief Executive of Labour Law Management Consulting. He may be contacted on (011) 888-7944 or 082 852 2973 or on e-mail address: , www.labourlawadvice.co.za

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